

15-3831

United States Court of Appeals
for the Second Circuit

KENNETH WASHINGTON,

Petitioner-Appellant,

- against -

THOMAS GRIFFIN,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of New York

JOINT APPENDIX – VOLUME TWO

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Dated: April 21, 2016

EXHIBIT B

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To be argued by
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(10 Minutes)

New York Supreme Court

APPELLATE DIVISION -- SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- against -

TO BE HEARD ON
THE ORIGINAL
RECORD

Queens County
Ind. No. 145/98
A.D. No. 11-00939

KENNETH WASHINGTON,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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POINT I

THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS WHO EXPRESSED DOUBTS ABOUT THEIR ABILITY TO BE IMPARTIAL DUE TO THEIR EXPERIENCES AS VICTIMS OF SIMILAR CRIMES DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY. U.S. CONST., AMENDS. VI, XIV; N.Y. CONST., ART. I, §§2, 6; C.P.L. §270.20(1)(b). 17

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IN VIOLATION OF APPELLANT'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM, THE COURT ERRED WHEN IT PRECLUDED DEFENSE COUNSEL FROM CHALLENGING THE STATISTICAL SIGNIFICANCE OF THE DNA EVIDENCE, THE SOLE EVIDENCE AGAINST APPELLANT, BY LIMITING CROSS-EXAMINATION OF THE PEOPLE'S EXPERT WITNESS AND RULING THAT THE DNA EXPERT HAD EXPERTISE IN "POPULATION STATISTICS" IN ADDITION TO DNA TESTING. 24

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----x
THE PEOPLE OF THE STATE OF NEW YORK, :
 Respondent, :
 -against- :
KENNETH WASHINGTON, :
 Defendant-Appellant. :
-----x

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 145/08.
2. The full names of the original parties were People of the State of New York against Kenneth Washington. There has been no change of parties on appeal.
3. This action was commenced in Supreme Court, Queens County.
4. This action was commenced by the filing of an indictment on February 27, 2008.
5. This appeal is from a judgment convicting appellant, after a jury trial, of three counts of burglary in the first degree, three counts of burglary in the second degree, two counts of assault in the first degree, two counts of assault in the second degree, criminal sexual act in the first degree, and sexual abuse in the first degree.
6. This is an appeal from a judgment of conviction rendered January 19, 2011.

7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered in the Supreme Court, Queens County, on January 19, 2011, convicting appellant, after a jury trial, of three counts of burglary in the first degree (P.L. §§140.30(2)(two counts), 140.30(3)), three counts of burglary in the second degree (P.L. §140.25(2)), two counts of assault in the first degree (P.L. §120.10(4)), two counts of assault in the second degree (P.L. §120.05(6)), criminal sexual act in the first degree (P.L. §130.50(1)), and sexual abuse in the first degree (P.L. §130.65(1)). Appellant received consecutive and concurrent determinate sentences aggregating 90 years' imprisonment plus 25 years' post-release supervision (Lasak, J., at trial and sentence).

Appellant filed a timely notice of appeal, and on March 29, 2011, this Court granted him leave to appeal as a poor person and assigned Lynn W. L. Fahey as appellate counsel.

Appellant had no co-defendants.

Appellant is currently incarcerated pursuant to the judgment. No stay has been sought.

QUESTIONS PRESENTED

1. Whether the trial court's denial of defense counsel's challenges for cause to two prospective jurors who expressed doubts about their ability to be impartial due to their experiences as victims of similar crimes deprived appellant of his rights to due process and an impartial jury. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §§2, 6; C.P.L. §270.20(1)(b).

2. Whether, in violation of appellant's rights to present a defense and to confront the witnesses against him, the court erred when it precluded defense counsel from challenging the statistical significance of the DNA evidence, the sole evidence against appellant, by limiting cross-examination of the people's expert witness and ruling that the DNA expert had expertise in "population statistics" in addition to DNA testing.

3. The court violated appellant's right to confront the witnesses against him by permitting the introduction of DNA testing evidence through a witness who did not have firsthand knowledge of the testing, in violation of Crawford v. Washington, 541 U.S. 36 (2004).

STATEMENT OF FACTS

Introduction

Appellant was charged with three separate burglaries, for which his identity was established solely by DNA evidence. On August 17, 2006, Cassandra Whitaker awoke to find someone going through her jewelry box. That person took her property and beat her severely. On December 5, 2006, Luisa Gonzalez and her family returned to their home to find that property had been taken. The

following July 17, 2007, Stacey Brown was beaten and sexually assaulted in her home by a man who took property. An expert witness testified that DNA profiles from the crime scenes matched appellant's DNA profile.

During jury selection, two prospective jurors who had had experiences similar to those of Whitaker and Brown expressed uncertainty about their ability to be fair to appellant. Neither prospective juror stated unequivocally that she could be impartial during deliberations in this case. But the court denied defense counsel's challenges for cause to these prospective jurors, and after he used peremptory challenges to exclude them, defense counsel exhausted his peremptory challenges.

An expert witness whose background was primarily in biology and chemistry and who worked in the Medical Examiner's laboratory where the DNA profiles were developed was permitted to testify not only as an expert in the development of those profiles, but as an expert in "population statistics" as well. As such she testified to a crucial and complex statistical link in the prosecution's case against appellant. Over defense objection, the court permitted the witness to be qualified as an expert in "population statistics" analysis although she had taken only one college statistics course, and a second course in the Medical Examiner's office. Moreover, the court prevented defense counsel from cross-examining the witness about DNA profile matching results from three other states that

raised key questions about the strength of the proof against appellant.

Jury Selection

Denial of a Defense Challenge for Cause

Prospective juror Santana said that 18 years before the trial she had been the victim of a crime similar to this one in that she awoke to find a stranger in her home. He took her belongings and tried to "fondle" her. Also, her niece had been raped two years prior to the trial by a stranger (294-297).¹ The court asked whether Santana "would have a problem sitting as a fair juror," and she responded: "I don't think so." Then she said she could be fair to both sides (295).

At a side bar, the following occurred:

THE COURT: Based on all these experiences do you think you could sit through a case like this?

MS. SANTANA: I think so.

THE COURT: Be fair to both sides?

MS. Santana: I think so.

THE COURT: No problem?

MS. SANTANA: I don't think so (297).

Defense counsel explained that the concern was whether "the past may come into play" in her "memories or emotions" "because

¹Numbers in parentheses refer to pages of the trial transcript.

it's so close." He asked Santana for "absolute assurance" that she could "set those aside and they wouldn't play any role in how you react to and deal with the testimony in this case" (297). She responded:

I want to say yes, but not 100 percent sure because . . . I have never been on trial except for when I had to testify. So I don't know. I think I would but I don't (297-298).

The court interrupted and explained that as a juror she could not "be affected by anything that happened" to her or her family, adding that if she could "do that" she could "be a juror" but she had to "give" them her "assurance." As before, she responded: "I think so" (298). Seeking further clarification, defense counsel asked if she could she could "set all those things aside and they will not play a role in the evidence in this case even if it comes out being similar to what you experienced yourself?" Santana replied: "No, because I would be looking at the facts, you know, of what's being presented" (298). Soon afterwards, the court asked:

THE COURT: Do you think you can objectively listen to what [the witnesses] say or are you going to feel some, I guess[,] take your experience, bring it in as you are considering them?

MS. SANTANA: I would say no, but I can't be 100 percent sure. Okay. I can only -

THE COURT: The bottom line is, can you make a decision on the evidence?

MS. SANTANA: Yes, I can (299).

Later, defense counsel asked whether, "knowing this case involves similar types of accusations" to what she and her niece had been through, she could set her "own experience aside, and base" her verdict "on the evidence," and she said she could. Counsel again asked whether she felt "confident she can do that or you are not sure?" and she said: "I feel confident" (326).

Defense counsel challenged Santana for cause because "she was the victim of the exact same crime that's accused here," "[h]er niece was the victim of a rape," and she said she could not "be 100 percent" fair (335-336). The prosecutor agreed that "she never said the words 100 percent" but asserted she repeatedly said, "I think I can be fair. I can be fair. I can be fair," when questioned by the court and by defense counsel (336). The court denied the challenge for cause, holding that Santana "never answered any question that the court felt rose to the level of a cause challenge" and she said "she could be fair" (337).

Denial of a Second Defense Challenge for Cause

Prospective juror Lende had been robbed at knife-point in an office building elevator about 10 years before the trial (310-311). When the court asked if she could base her "verdict only on the evidence and not be affected by what happened to" her, she responded: "I believe so" (311). When asked by defense counsel whether she could "set aside" that experience or was "not

completely sure," she repeated several times that she "believe[d]" she could set it aside (327-328).

Asked by the court if she had "any hesitancy" about her ability to be fair, Lende admitted:

[T]here is some hesitancy because in my mind I see it like it's yesterday. Being in an enclosed area everything is heightened. So I believe I could, but that's not to say definitively that I could be 100 percent not thinking about it and being 100 percent fair on that account (340).

The court stated that she was not expected to "forget about these bad experiences" and asked if she could "sit and listen to the testimony, view the evidence and make a determination only on the evidence. . . . Place your memory of any bad incident aside. Can you do that or can't you do that?" (340). Lende responded: "I would say I could do that" (340).

Defense counsel challenged Lende for cause because she "did not give an unequivocal assurance that she could set aside her own experiences and be fair, [as] it was always premised on I believe so" (339). He argued that "the legal standard is whether a juror can unequivocally state they can be fair and impartial," but Lende had not met that test because she "expressed hesitancy about it," even though she answered the court's question, asked "with the authority of the court," about whether she could make a determination only on the evidence and set her experience aside by saying she could (341, 343). The prosecutor said the issue was not

whether she had "hesitancy," but whether she could "set it aside and be fair," and she had said she could (343). The court denied the challenge because when it had framed the question as whether she could put her "memory . . . aside and base [her] verdict only on the evidence . . . she said she could" (341-343).

Exercise of Peremptory Challenges

Defense counsel used peremptory challenges to exclude Santana and Lende from the jury (338, 344). He exhausted his peremptories before the parties selected 12 jurors (344).

The Trial

The First Burglary

At about 2:00 a.m. on August 17, 2006, Detective Cassandra Whitaker awoke to see a man, whose face was covered and who wore a white T-shirt and socks on his hands, searching the jewelry box in her bedroom in her house at [REDACTED]^h Street in Queens (478-479, 489, 502-504, 545-547, 569). She tried to take her loaded gun from the nightstand drawer without making noise, but he grabbed her hand and after repeatedly hitting her in the face, took the gun from her, hit her with it, and pushed her into the bathroom, and then the bathtub. She was bleeding profusely from her head and forehead and from around her eyes (490-497, 532-539, 568-569). He closed the door and left the room, but when she tried to get up, he returned, hit her head with the gun, and stomped on her face. He

turned her pocketbook upside down and emptied it, partly on her, and searched her wallet, then left the room and closed the door. She used her cell phone, which had fallen into the tub, to call 911 (496-499, 540-541). Whitaker had never given appellant permission to be in her house (504).

Whitaker sustained lacerations and severe bruises, but no cranial bleeding or spinal fractures. When she returned home from the hospital a few days later, after seeing a plastic surgeon and receiving stitches to her face and staples to her head, she found that some of her property was missing (Whitaker: 505-509; Sandra Torres, M.D.: 576-583). She did not return to work until about the first of December (510-511).

The Second Burglary

On December 5, 2006, when Luisa Gonzalez and her family returned to her apartment at [REDACTED] Street after work, they observed signs of an intrusion and noticed that property had been taken. They pointed out to the police two gloves that did not belong to them. Neither Gonzalez nor her son knew appellant (Gonzalez: 677-682, 689-693; Luis Alonzo: 886-891).

The Third Burglary

On July 15, 2007, Stacy Brown, six months pregnant and a mother of three, slept alone in the house at 1 [REDACTED] Road. In the early morning hours, while it was still dark, she was awakened

by a "loud thump." She noticed that some things had been moved, but she returned to bed (699-708, 754-755).

After the telephone woke her at about 1:00 p.m., a person wearing her white robe and with his face covered by a white towel or T-shirt forced her face down onto the pillow and held her down while he fondled her "butt" and his penis touched the outside of her anus (708-714). He punched and choked her, asked for money and jewelry, and tied a T-shirt around her face so she could only see downward, but could not see his face (713-716, 766-767). He wore socks on his hands during part of the incident (735, 762-763).

The man dragged her to the kitchen, where she saw the bottom of the refrigerator open and heard him gulping. He spat on her body, then an iced tea container dropped to the floor (716-718, 767-769, 772). When he brought her to another bedroom and choked her until, about to pass out, she defecated on herself, he threw her in the shower and told her to wash off. She tried to remove the T-shirt from her head, but he hit her in the face (718-721). Again he grabbed her and touched his erect penis to the outside of her anus, then choked her until she could not breathe. She defecated again, and he put her on the toilet (722-727). After he left the bathroom, she closed and locked the door, opened a window that was 8 feet off the ground, and exited head first (728-730, 734). Brown had never given appellant permission to be in the house (751).

Brown suffered bruises and abrasions, but her head, spine, and pelvis were not damaged and there were no "continuing complications" to her health or that of the baby, who was three years old at the time of the trial (Brown: 733-737; Lawrence Kramer, M.D.: 820-828). She later learned that jewelry, money, and eyeglasses had been taken from the house (736-737).

Evidence Sent for DNA Testing and Initial Matching of Profiles

During daylight hours on the day of the Whitaker burglary, the police recovered a bloody white T-shirt, a bloody white sock, and a black stocking cap near the house. Whitaker said that those items looked like the ones worn by the burglar (516-517). The shirt was sent for DNA testing (Detective Patrick Curran: 398-407, 453-454; Detective Daniel Boggiano: 619-622, 635). Also sent for testing were the gloves found in Gonzalez's apartment and the iced tea container from Brown's residence (Detective Shamika Meadows: 640-652; Melvin Shaw: 782-784; Police Officer Yuan Ye: 796-801; Detective William Porter: 845-848).

The parties stipulated that on October 10, 2007, appellant's DNA profile in the New York State database matched the DNA profiles from the T-shirt, glove, and iced tea container and that appellant was not an identical twin (894-895). After Detective Rich Santangelo arrested appellant on October 11, 2007, Curran took a DNA swab from appellant's cheek and sent it for DNA testing (Curran: 425-427; Santangelo: 871-872).

Defense Counsel's Challenges to the Expert's Opinion About the Likelihood that the DNA Profiles Would Match

Natalyn Yanoff, an expert in DNA analysis and forensic biology, had a Bachelor of Science degree in analytical chemistry from Russia and another in molecular biology from Long Island University. She had performed and supervised thousands of DNA analyses and comparisons and took proficiency exams twice each year by testing samples (897-898, 901).

After eliciting testimony that Yanoff had received training in "population statistics" and used them at her work in the Medical Examiner's DNA laboratory, the prosecution offered her as an expert, as well, in the "statistical significance of DNA profiles." Under questioning by defense counsel, she admitted she had taken only one college course in statistics and a course in "population statistics" in the Medical Examiner's office. While she received "continuing education" in the Medical Examiner's office, she did not explicitly state whether it included courses in statistical analysis, and she admitted she had taken no additional statistics courses there. Defense counsel objected to Yanoff's being declared an expert in statistical analysis, but the court overruled the objection without giving an explanation (896-901).

Yanoff explained that a DNA profile consists of a string of numbers, two of which are found at up to 15 tested locations, or loci, on a person's DNA, which actually has many more locations that are not tested. Until 2007, only 13 locations were tested,

and sometimes readings cannot be obtained at every location tested (902-906, 926-927, 962-963).

The profiles in Yanoff's office's database had never been compared to each other, and in her opinion it would be meaningless to make such comparisons (964-965). Defense counsel attempted to cross-examine Yanoff about the results in Arizona, where the 65,000 profiles in the state DNA database were compared to each other and 122 matches resulted when nine loci, or DNA locations, were compared. He also sought to question her about similar results in Illinois and Maryland. The court sustained the prosecutor's objection to these inquiries, again without explanation (965-966).

Yanoff prepared DNA profile reports from the evidence from each of the three burglaries and from the swab taken from appellant, but admitted that she did not do all of the underlying testing and document preparation on which those reports were based (909-912, 950-952). Although she scraped the T-shirt collar for DNA skin cells, she submitted the scrapings to others for testing (922-923), and she never personally examined the glove or iced tea container prior to trial (946-947). Nor did she examine or test appellant's cheek swab (950-952). Defense counsel objected to admission of those reports, and to a report comparing the four DNA profiles, asserting that they violated appellant's federal and state constitutional right to confront the witness against him. The court overruled that objection (912-914, 951-952, 954).

Yanoff testified that the DNA profile from the blood on the white T-shirt matched Whitaker's DNA profile (922-924) and that the DNA profile from appellant's cheek matched the profiles from the T-shirt, glove, and iced tea container, so that they all came from appellant (952-954, 957). However, results could not be obtained for one of the 13 loci from the T-shirt, and for three other loci only one of the two readings were obtained (929-930, 988-994; People's Exhibit 40)

According to Yanoff, the probability of a particular DNA profile appearing is calculated by multiplying the likelihood of the readings at a particular loci occurring by the likelihood of the readings for all the other loci in the profile occurring (1013-1014). Yanoff claimed that, based on the 13 loci with two readings in each location, the likelihood of appellant's profile appearing in the profiles from each burglary was one in more than one trillion (948-949, 956). In fact, she was "pretty sure" that results from only 10 loci would create a probability of less than one in a trillion that the particular profile would occur (959-962). Of course, if the results for any location differed, then two profiles would be from different people (958-959).

Prosecutor's Summation

The prosecutor argued that appellant's guilt was proved by the DNA evidence, which is "the most reliable form of evidence on earth today" and "the gold standard in identification evidence" (1078).

She claimed that Yanoff was "trained in statistical analysis" (1085) and contended that the "DNA testing was amazing, competent and certainly not bungled" (1104).

Charge, Deliberations, and Verdict

The court submitted to the jury first- (two counts) and second-degree burglary and first- and second-degree assault with regard to Whitaker; second-degree burglary with regard to Gonzalez; and first- and second-degree burglary, first- and second-degree assault, first-degree criminal sexual act, and first-degree sexual abuse with regard to Brown (1123-1141).

During the first day of deliberations, the jury asked for all of the exhibits relating to the DNA tests, part of Yanoff's testimony, and reinstruction on the definition of reasonable doubt and on whether jury unanimity was required for a not guilty verdict (1146-1148). On the following day, the court provided this material (1153-1155), and the jury convicted appellant of the counts charged (1157-1162).

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS WHO EXPRESSED DOUBTS ABOUT THEIR ABILITY TO BE IMPARTIAL DUE TO THEIR EXPERIENCES AS VICTIMS OF SIMILAR CRIMES DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY. U.S. CONST., AMENDS. VI, XIV; N.Y. CONST., ART. I, §2, 6; C.P.L. §270.20(1)(b).

The court refused to grant defense challenges for cause to two prospective jurors who expressed uncertainty about their ability to reach a verdict without being be uninfluenced in their deliberations by their experiences as victims of similar crimes. While the prospective jurors said they could decide the case solely on the evidence, they never stated unequivocally that they could do so impartially. By erroneously denying these challenges for cause, the trial court deprived appellant of his constitutional and statutory rights to due process and an impartial jury. Therefore, appellant is entitled to a new trial. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §2, 6; C.P.L. §270.20(1)(b), (2); Irvin v. Dowd, 366 U.S. 717 (1961).

"To safeguard the cherished right to an impartial jury," People v. Johnson, 94 N.Y.2d 600, 610-611 (2000), a challenge for cause must be granted when a prospective juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial." C.P.L. §270.20(1)(b). As a result, a prospective "juror who has revealed doubt . . .

about her ability to serve impartially must be excused unless the juror states unequivocally on the record that she can be fair." People v. Arnold, 96 N.Y.2d 358, 362 (2001). Accord, People v. Chambers, 97 N.Y.2d 417, 419 (2002); People v. Johnson, 94 N.Y.2d at 614; People v. Blyden, 55 N.Y.2d 73, 77-78 (1982).

Thus, an unequivocal statement of impartiality must be made when prospective jurors or their relatives were victims of crimes similar to those charged and expressed concern that their experiences might prejudice their ability to be fair. People v. Rose, 73 A.D.3d 1091, 1093 (2d Dept. 2010); People v. Hayes, 61 A.D.3d 992, 993 (2d Dept. 2009); People v. Greene, 290 A.D.2d 349, 350 (1st Dept. 2002). To satisfy this standard, a potential juror must "state[] unequivocally" and "clearly express" that she or he will be able to deliberate impartially. People v. Arnold, 96 N.Y.2d at 362. The juror's impartiality must be "voiced with conviction," People v. Blyden, 55 N.Y.2d at 78, as there is a "bright-line standard" that "a prospective juror who . . . cannot unequivocally promise to set aside [his or her] bias should be removed for cause." People v. Johnson, 94 N.Y.2d at 614 (citation omitted).

To make an unequivocal declaration of impartiality, a prospective juror "must expressly state that his prior state of mind . . . will not influence the verdict, and . . . that he will render an impartial verdict based solely on the evidence." People

v. Blyden, 55 N.Y.2d at 77-78. See People v. Arnold, 96 N.Y.2d at 362-363 (prospective jurors must state that potential bias "will not prevent them from reaching an impartial verdict" and that they "will decide the case impartially and based on the evidence"). This Court has repeatedly applied this standard. People v. Borges, 90 A.D.3d 1067, 1068 (2d Dept. 2011) ("the prospective juror must unequivocally state that his or her prior state will not influence his or her verdict and that he or she will render an impartial verdict based solely on the evidence"); People v. MacFarlane, 87 A.D.3d 700, 701 (2d Dept. 2011) (same); People v. Rose, 73 A.D.3d at 1092 (same); People v. Goodwin, 64 A.D.3d 790, 792 (2d Dept. 2009) (same); People v. Johnson, 40 A.D.3d 1011 (2d Dept. 2007) (same).²

In determining whether a prospective juror's statements met this test, a trial court should consider the juror's statements as a whole, rather than in isolation. People v. Johnson, 94 N.Y.2d at 615-616; People v. Blyden, 55 N.Y.2d at 78; People v. Faulkner, 36 A.D.3d 1071, 1072 (3d Dept. 2007); People v. Grant, 297 A.D.2d 687, 688 (2d Dept. 2002). "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of

²While the Court in earlier cases sometimes referred, instead, to a prospective juror's statement of the ability to "render a verdict based solely on the evidence" as curative, People v. Russell, 13 A.D.3d 655, 656 (2d Dept. 2004); People v. Kenner, 8 A.D.3d 296, 297 (2d Dept. 2004), those cases also required a prospective juror to state "unequivocally on the record that [he or] she can be fair."

excusing the juror, since at worst the court will have 'replaced one impartial juror with another.'" People v. Arnold, 96 N.Y.2d at 362 (citation omitted). Accord, People v. Hayes, 61 A.D.3d at 993; People v. Harris, 14 A.D.3d 622 (2d Dept. 2005).

Under these standards, the court erred in denying defense counsel's challenges for cause to prospective jurors Lende and Santana. Lende raised the question of her impartiality when she testified that "in [her] mind" she saw "like it's yesterday" her experience of being robbed at knife-point in an elevator, adding that "everything [was] heightened" because it happened in "an enclosed area" (310-311, 340). See People v. Johnson, 94 N.Y.2d at 614; People v. Greene, 290 A.D.2d at 350.

The court asked whether Lende could reach a verdict only on the evidence without being affected by her experience. She initially said she "believed[]" she could, but she declined defense counsel's invitation to say she was "completely sure," instead merely repeating her "believe[d]" answer (311, 327-328). When the court probed further, she admitted to "some hesitancy" and said she could not say "definitively" that she "could be 100 percent not thinking about it and being 100 percent fair on that account" (340). Lastly, she responded to the court's question as to whether she could "[p]lace [her] memory of any bad incident aside" and "make a determination only on the evidence" by saying, "I would say I could do that" (340). The court denied defense counsel's

challenge for cause, explaining that Lende had said she could base her verdict "only on the evidence" (341-343).

Lende's admissions of uncertainty that she could be "100 percent fair" and of "hesitancy" fell far short of the "clear express[ion]" of impartiality, voiced unequivocally and with "conviction," that is required to satisfy the "bright-line standard" for denying a challenge for cause. See People v. Arnold, 96 N.Y.2d at 362; People v. Johnson, 94 N.Y.2d at 614; People v. Blyden, 55 N.Y.2d at 78. Since her responses had to be viewed as a whole, see People v. Johnson, 94 N.Y.2d at 615-616; People v. Blyden, 55 N.Y.2d at 78; People v. Grant, 297 A.D.2d at 688, her final statement, in response to what amounted to a leading question by the court, that she "would say" she could "make a determination only on the evidence" and place her vivid memories of the knife-point robbery aside did not constitute an unequivocal declaration of impartiality. Indeed, her language, that she "would say," is far from an explicitly definitive expression even when considered only by itself.

Lende's statement regarding her ability to set her memories aside and reach a verdict based solely on the evidence also fell short of the required unequivocal declaration because the case law requires that a prospective juror state "expressly state" that she can render an impartial verdict. See People v. Arnold, 96 N.Y.2d at 362-363; People v. Blyden, 55 N.Y.2d at 77-78; People v. Borges,

90 A.D.3d at 1068; People v. MacFarlane, 87 A.D.3d at 701; People v. Rose, 73 A.D.2d at 1092. This Lende failed to do.

Similarly, prospective juror Santana raised the question of her ability to be impartial when she told the court that she had been the victim of a crime similar to those charged in this case when, after she awoke to find a stranger taking her belongings, he attempted to assault her sexually. In addition, in a separate incident, her niece had been raped. At that point, the court was obligated to excuse Santana unless she unequivocally stated that she could render a fair and impartial verdict. People v. Arnold, 96 N.Y.2d at 362-363; People v. Blyden, 55 N.Y.2d at 77-78; People v. Borges, 90 A.D.3d at 1068; People v. MacFarlane, 87 A.D.3d at 701; People v. Rose, 73 A.D.2d at 1092.

When asked whether she could be "fair" despite her experience and that of her niece, Santana repeatedly said, "I think so," and when asked, "no problem?" similarly responded, "I don't think so" (295, 297). Counsel asked for "absolute assurance" that she could set aside her "memories or emotions," and she admitted she was "not 100 percent sure" she could do that, adding that as she had never been a juror she did not know (297-298). To clarify, the court asked if she could not "be affected by anything that happened" to her or her family, and again she responded only: "I think so" (298). She again conceded that she was not "100 percent sure" she could deliberate uninfluenced by her experiences (299). Finally,

when the court asked if she could "make a decision on the evidence," she said she could (299), and later, she said she felt "confident" she could set aside her experience and base her verdict on the evidence (326).

As with Lende, Santana failed to unequivocally state her impartiality. To the contrary, she repeatedly gave voice to her uncertainty about her impartiality, and her final statements, examined in the context of her earlier ones, failed to remove the doubt she had sown. This is especially true because, like Lende, she said she could set aside her experience and make a decision on the evidence, but failed to state unequivocally that she could render an impartial verdict.

In sum, both Lende and Santana expressed uncertainty about their ability to deliberate impartially, uninfluenced by their own experiences that were similar to those of two of the victims in this case. Especially viewed in the context of all of their testimony in this case, these prospective jurors, both victims of violent crimes, failed to state unequivocally that they could deliberate impartially in this case involving violence and sexual assault. Since defense counsel exercised peremptory challenges with regard to both prospective jurors and subsequently exhausted his peremptory challenges, these issues are preserved for appellate review, and appellant's convictions should be reversed. See People

v. Borges, 90 A.D.3d at 1068; People v. MacFarlane, 87 A.D.3d at 702; People v. Rose, 73 A.D.2d at 1093.

POINT II

IN VIOLATION OF APPELLANT'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM, THE COURT ERRED WHEN IT PRECLUDED DEFENSE COUNSEL FROM CHALLENGING THE STATISTICAL SIGNIFICANCE OF THE DNA EVIDENCE, THE SOLE EVIDENCE AGAINST APPELLANT, BY LIMITING CROSS-EXAMINATION OF THE PEOPLE'S EXPERT WITNESS AND RULING THAT THE DNA EXPERT HAD EXPERTISE IN "POPULATION STATISTICS" IN ADDITION TO DNA TESTING.

The key question in this trial was whether appellant was the person who committed the three crimes, and the only proof that appellant was that person was the DNA evidence. By conceding that the DNA profiles from those crimes matched appellant's DNA profile from the New York State database, defense counsel further reduced the key contested issues to one: how significant that matching was, an issue that could not be decided without expert "population statistics" testimony about the significance of the matches between appellant's DNA profile and the profiles from the crime scene. Yet, the court prohibited defense counsel cross-examining the expert about DNA profile comparisons from other states that suggested that DNA matches were not nearly as rare as she had testified. Moreover, the expert called by the prosecution, while clearly qualified to testify about developing and comparing DNA profiles, was just as clearly not qualified to give an opinion

about the statistical significance of DNA matches. Since without statistical evidence of the significance of the DNA matches, the proof that appellant was the person who committed these crimes would have been insufficient, appellant's convictions should be reversed and a new trial ordered. U.S. Const., Amends. V, XIV; N.Y. Const., Art. 1, §6; Davis v. Alaska, 415 U.S. 308, 316 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973).

It has long been established that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294. Few rights are more fundamental to due process than the rights of a defendant to present a "complete defense," Crane v. Kentucky, 476 U.S. 683, 690 (1986), and to confront the witnesses against him through cross-examination, Pointer v. Texas, 380 U.S. 400, 403-404 (1965). Indeed, cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested," Davis v. Alaska, 415 U.S. at 316, and "the greatest legal engine ever invented for the discovery of the truth," California v. Green, 399 U.S. 149, 158 (1970), is "critical for ensuring the integrity of the fact-finding process," Kentucky v. Stincer, 482 U.S. 730, 736 (1987). Accordingly, the rights to present a complete defense and confront witnesses entitle a defendant to cross-examine a witness

about the material facts in issue. Davis v. Alaska, 415 U.S. at 316-17; Alford v. United States, 282 U.S. 687, 692 (1931).

Further, a trial court's discretion in making evidentiary rulings "is circumscribed by . . . the defendant's constitutional right to present a defense." People v. Carroll, 95 N.Y.2d 375 (2000). Accord Holmes v. South Carolina, 547 U.S. 319, 324-331 (2006); Rock v. Arkansas, 483 U.S. 44, 52, 59 (1987). Thus, while a trial court ruling on an objection to a line of cross-examination must weigh the probative value of cross-examination against the possibility of confusion or prejudice, People v. Hayes, 17 N.Y.3d 46, 53, cert. denied sub nom., Hayes v. New York, __ U.S. __, 132 S.Ct. 844 (2011), when cross-examination has been improperly curtailed, this Court has consistently and repeatedly reversed the conviction. See e.g., People v. Bunge, 70 A.D.3d 710, 711 (2d Dept. 2010); People v. Baranek, 287 A.D.2d 74, 78-80 (2d Dept. 2001); People v. Panetta, 250 A.D.2d 710, 711 (2d Dept. 1998); People v. Rufrano, 220 A.D.2d 701, 702 (2d Dept. 1995); People v. Elder, 207 A.D.2d 498, 499 (2d Dept. 1994).

In this case, the court violated appellant's rights to present a defense and to confront the prosecution's witnesses when it prevented defense counsel from cross-examining the prosecution's DNA expert about the results of DNA profile matching from three other states, Arizona, Illinois, and Maryland, that would have undermined inferences that the likelihood of a false match between

appellant's DNA profile and those from the crime scenes was infinitesimally small. Instead, the court permitted the expert's testimony that the probability of someone having appellant's profile was one in more than one trillion, the result of multiplying the probability of the readings at each loci by the probability of the readings at the other loci, to stand as if that alone indicated the probability that anyone but appellant was the perpetrator.

However, a July 2008 Los Angeles Times article reported that the three states defense counsel mentioned had produced unexpected matches by running each profile in their DNA databases against all the other profiles. Jason Felch and Maura Dolan, "FBI Resists Scrutiny of Matches," Los Angeles Times, July 20, 2008, p. A1 (hereinafter "LA Times"). In Arizona, in a database of 65,000, at nine DNA loci there were 122 matches, and at 10 loci, which Yanoff claimed should result in a matching probability of one in more than one trillion, there were 20 matches. Similarly, Illinois comparisons produced 903 matches at nine or more loci in a database of about 220,000, Id., while Maryland produced 33 matches in a database of about 20,000, 11 of them at 10 or more loci. United States v. Davis, 602 F.Supp.2d 658, 681 (D.Md. 2009); LA Times. See also "Prince George's County Case: Raising Doubt on DNA," The Baltimore Daily Record, July 25, 2008. A much larger database, as

would be applicable to a metropolitan area such as New York City, would produce many more matches.

These results indicate that when, as here, proof in a criminal case is based solely on DNA profile matching, there exist complex issues of statistical interpretation in translating the likelihood of a particular DNA profile occurring into the likelihood that only the defendant's profile matches that of the perpetrator. The Supreme Court has emphasized that "it is important that [DNA evidence] be presented in a fair and reliable manner" since "DNA testing can provide powerful new evidence unlike anything known before" and is very "persuasive[] . . . in the eyes of the jury." McDaniel v. Brown, __ U.S. __, 130 S.Ct. 665, 675 (2010) (citation omitted). See Sarah M. Ruby, "Checking the Math: Government Secrecy and DNA Databases," 6 ISJLP³ 257, 258 (2010) ("[s]tudies show that DNA is particularly persuasive to juries," possessing "a special aura of certainty and mystical infallibility" and being "so persuasive that its mere introduction in a criminal case is sufficient to seriously impede defense challenges").

Demonstrating a match between a person's DNA profile and one found at the crime scene is not the same as showing that no other person's DNA could match as well. As former Chief Judge Kaye (concurring) warned in People v. Wesley, 83 N.Y.2d 417, 444 (1994):

³This abbreviation refers to "I/S: A Journal of Law and Policy for the Information Society."

evidence of a [DNA] "match" is virtually meaningless without resort to the statistical interpretation; population genetics is arguably the most crucial step of the analysis. It is the area of greatest controversy among the experts.

The Supreme Court further explained:

if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy.

McDaniel v. Brown, 130 S.Ct. at 670 (emphasis added) ("The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample"). This is because it would be "erroneous" to conclude that the 1 in 10,000 chance of someone sharing the perpetrator's DNA means that "there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty." Id.

To use a commonplace example, the odds of a person's sharing a birthday with another specific person are 1 in 365, but the odds of that person having a birthday match in a group of 100 people is about one in four, which is arrived at by multiplying the 1 in 365 odds of a match with a particular person by the number of other people there (99). LA Times. In addition, it is almost certain that any two of the 100 people would share a birthday, because

comparing all 100 people against each other results in 4,950 comparisons. LA Times.

Similarly, considering the likelihood that anyone, not just a particular person, might win a lottery, the court in Crews v. Johnson, 702 F.Supp.2d 618, 637-638 (W.D. Va. 2010), aff'd sub nom, Crews v. Clarke, ___ F.3d 2011 WL 6062054 (4th Cir. 2011), stated that "[t]o provide the appropriate interpretation of a database match to a jury, it is widely accepted that some number other than the [probability calculated by multiplying the loci results together] . . . should be presented." "[B]ecause the search of the database increases the odds that a coincidental match will be found, the product rule calculation does not express the likelihood that a match" in a case based solely on DNA profile matching "is coincidental." United States v. Davis, 602 F.Supp.2d at 674 (emphasis added). See also United States v. Jenkins, 887 A.2d 1013, 1018 (D.C. 2005); People v. Nelson, 43 Cal.4th 1242, 1260, 185 P.3d 49 (2008). However, "what is not settled is the best way to calculate" the significance of DNA findings in such cases. United States v. Davis, 602 F.Supp.2d at 674.

Mathematicians have similarly recognized the complexities of using matching DNA profiles in the absence of other evidence. See David H. Kaye, "Trawling DNA Databases for Partial Matches; What is the FBI Afraid Of?," 19 Cornell J. L. & Pub. Pol'y 145, 148 (Fall 2009) (quoting Keith Devlin, a Stanford University mathematician, as

referring to high numbers obtained by multiplying loci probabilities as "total nonsense" and "damned lie[s]," as opining that "it is 'disgraceful' that courts allow experts to provide such small random-match probabilities," and as characterizing the discrepancy between those numbers and results like those in Arizona as "[s]cary"). The appropriate method of determining the likelihood that anyone other than the defendant might share the DNA profile derived from the crime scene has been a matter of scientific discussion and debate, with some advocating for application of a mathematical formula called "Bayes's Theorem." For example, David H. Kaye, "Case Comment-People v. Nelson: a Tale of Two Statistics," 7 Law, Probability & Risk, 249 (December 2008), engages in an extended and complex discussion of the subject. Indeed, Kaye states that "t]wo committees of the U.S. National Academy of Sciences" have considered the issue. Similarly, the Abstract to Sarah M. Ruby's "Checking the Math: Government Secrecy and DNA Databases," 6 ISJLP 257 (2010), states that:

DNA matches are as significant as statistics tell us they are. DNA match statistics are calculations that describe the likelihood of a coincidental match between a person suspected of crime and the DNA sample found at a crime scene. These numbers are difficult for laypeople to understand, and the methodology behind them is the subject of scientific debate.

In this case, the expert's testimony - that the likelihood that appellant's DNA profile would match the one from the

burglaries was one in more than one trillion - was highly persuasive evidence and was most likely seen as unassailable by the jury. Indeed, in summation, the prosecutor maintained that the "DNA testing was amazing" (1104) and that the DNA evidence was "the most reliable form of evidence on earth today" and "the gold standard in identification evidence" (1078). However, the actual inculpatory value of this evidence is not what the jury must have understood from this argument and the expert's testimony. As a result, the court should have permitted defense counsel to use all of the tools available to him to attack that evidence. Counsel chose to counter the expert's testimony in two ways, but the court thwarted both attempts.

Initially, defense counsel argued that Natalyn Yanoff lacked the qualifications to testify as an expert in "population statistics," as she admitted she had taken only one college course in statistics and another of unspecified length at the Medical Examiner's office. Before expert testimony is permitted, the party offering the expert has the burden of establishing that she possesses "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." Mattot v. Ward, 48 N.Y.2d 455, 459 (1979). See Catanese v. Furman, 9 A.D.3d 863, (4th Dept. 2004) ("[p]laintiffs failed to establish the qualifications of their expert"); United States v. Davis, 602 F.Supp.2d at 681. A

trial court's ruling on an expert's qualifications can be reversed when "serious mistake, an error of law or abuse of discretion" is demonstrated, Werner v. Sun Oil Co., 65 N.Y.2d 839 (1985); People v. Owens, 70 A.D.3d 1469, 1470 (4th Dept. 2010), although the Appellate Divisions clearly have power to review the exercise of discretion as well. C.P.L. §470.15. See Matter of Garcia v. Selsky, 266 A.D.2d 772, 773 (3d Dept. 1999) (as witness "plainly was not qualified as an expert" despite "some background in this area," witness's testimony should be disregarded in evaluating the strength of the evidence).

In this case, proof of the statistical significance of the DNA profile matching, which was the only proof that identified appellant as the perpetrator of the crimes while seemingly excluding all others, was essential to the prosecution's case, and in light of the authorities cited above, the statistical issues involved were complex ones. Yet, Yanoff had not even majored in mathematics or statistics in college, taking only one college statistics course and a second course, of unspecified length, while in the Medical Examiner's office. Her admission that she was only "pretty sure" of part of her statistical claims made it clear that her background in the area was inadequate. While she was qualified to develop the DNA profiles, she was clearly not equipped to explain accurately to the jury the difficulties of translating the likelihood of a particular DNA profile appearing into the

likelihood that someone other than appellant could have had the same profile. Therefore, the court erred in accepting her as an expert in "population statistics."

The court further erred by barring defense counsel from cross-examining Yanoff about the numerous identical DNA profiles in the databases in Arizona, Illinois, and Maryland discovered when all the profiles in those databases were checked against each other. This line of questioning would have been counsel's most effective attack on the only proof of identification, but the court kept it completely out of the case. It is clear that the results in these states and related concerns have raised substantial questions in the scientific community about how DNA profile matches should be interpreted when they are the only evidence against a defendant. Therefore, exploration of these inconsistent results was essential to defense counsel's ability to defend against the DNA evidence.

These errors cannot be deemed harmless unless the proof of appellant's guilt was "overwhelming" and there was "no significant probability that the jury would have acquitted [appellant] were it not for the error[s]." People v. Santiago, 17 N.Y.3d 661, 673-674 (2011); People v. Crimmins, 36 N.Y.2d 230, 241-242 (1975). Thus, "[w]here, as here, the [witness's] testimony was crucial to the People's case and the defendant's cross-examination of the [witness] was significantly curtailed, such error cannot be considered harmless." People v. Rufrano, 220 A.D.2d at 702.

In sum, given the obvious and compelling relevance of the precluded questioning to the only proof of guilt, the court not only abused its discretion, but failed to exercise any discretion whatsoever, by erroneously precluding counsel from questioning Yanoff about the Arizona, Illinois, and Maryland results, in violation of appellant's rights to present a defense and to confront the witnesses against him. The court also erred by permitting Yanoff to testify as an expert about "population statistics," which was similarly essential to the prosecution's case, although she lacked the qualifications to provide that testimony. Defense counsel preserved these issues for review by asking to engage in the prohibited cross-examination and arguing that Yanoff was not qualified to testify as an expert in population statistics. As a result, the court's curtailment of appellant's cross-examination of Yanoff and acceptance of her as a "population statistics" expert require that appellant's convictions be reversed on the law and a new trial ordered.

POINT III

THE COURT VIOLATED APPELLANT'S RIGHT TO
CONFRONT THE WITNESSES AGAINST HIM BY
PERMITTING THE INTRODUCTION OF DNA TESTING
EVIDENCE THROUGH A WITNESS WHO DID NOT HAVE
FIRSTHAND KNOWLEDGE OF THE TESTING, IN
VIOLATION OF CRAWFORD V. WASHINGTON, 541 U.S.
36 (2004).

Defense counsel objected to the testimony of the People's expert witness regarding DNA testing done on evidence found at the crime scenes and appellant's cheek swab because the witness had not performed all of the tests on which the DNA profiles were based. Rather, the witness testified as to the protocol followed and the actions taken by other people, in violation of the Confrontation Clause. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. 1, § 6; Crawford v. Washington, 541 U.S. 36 (2004).

The Confrontation Clause protects a defendant against "testimonial" evidence untested by cross-examination. Crawford v. Washington, 541 U.S. at 49-55. Although it left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" id. at 68, the Court noted that a testimonial statement consists of a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51.

Since Crawford, the Supreme Court has held that certified documents regarding lab testing that determined a substance was cocaine and its weight were documents created for the "sole purpose" of being introduced at trial and were, therefore,

testimonial statements. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2532 (2009). Most recently, in Bullcoming v. New Mexico, __ U.S. __, 131 S.Ct. 2705, 2717 (2011), the Court held that blood-alcohol analysis reports were testimonial.

The present case falls within the Supreme Court's decisional law. The evidence of testing done on the crime scene evidence and appellant's cheek swab was introduced through Yanoff, an expert witness who admittedly had not actually performed all of those tests, which were conducted for the ultimate purpose of a criminal trial. Thus, that witness's testimony about the development of the DNA profiles violated appellant's right to confrontation.

We acknowledge that the Court of Appeals has held that the introduction of such DNA evidence is not barred by the Confrontation Clause, People v. Brown, 13 N.Y.3d 332 (2009); People v. Rawlins, 10 N.Y.3d 136 (2008), and that this Court's decisional law is in line with that of the Court of Appeals, see, e.g., People v. Thompson, 70 A.D.3d 866, 866-867 (2d Dept. 2010). Recently, however, the Supreme Court granted certiorari in a case that presents this issue. People v. Williams, 939 N.E.2d 268, 277-282 (Ill. 2010), cert. granted sub nom., Williams v. Illinois, 131 S.Ct. 3090 (2011). We, therefore, respectfully urge the Court to reconsider its position in light of this development and the Supreme Court's decisions in Bullcoming v. New Mexico, 131 S.Ct. 2705, and Melendez-Diaz v. Massachusetts, 557 U.S. 305. As this

issue was preserved by defense counsel's objection on grounds that appellant's right to confront the witnesses against him was being violated, appellant's conviction should be reversed and a new trial ordered.

CONCLUSION

FOR THE REASONS STATED ABOVE, APPELLANT'S
CONVICTIONS SHOULD BE REVERSED AND A NEW TRIAL
ORDERED.

Respectfully submitted,

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April 2012

CERTIFICATE OF COMPLIANCE

PURSUANT TO 22 NYCRR §670.10(f)

The foregoing brief was prepared on a computer. A monospaced typeface was used, as follows:

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Jonathan M. Kratter

EXHIBIT C

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A418

To be argued by
JENNIFER HAGAN
(TIME REQUESTED: 10 MINUTES)

New York Supreme Court

Appellate Division--Second Department

AD No. 11-00939

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

against

KENNETH WASHINGTON,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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Queens County
Indictment Number 145/08

A000229

A419

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,	:
Respondent,	:
-against-	:
KENNETH WASHINGTON,	:
Defendant-Appellant.	:

----- x

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

Defendant Kenneth Washington appeals from a January 19, 2011, judgment of the Supreme Court, Queens County (Lasak, J.). By that judgment, defendant was convicted, after a jury trial, of three counts of Burglary in the First Degree (Penal Law §§ 140.30[2] and [3]); three counts of Burglary in the Second Degree (Penal Law § 140.25[2]); two counts of Assault in the First Degree (Penal Law § 120.10 [4]); two counts of Assault in the Second Degree (Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (Penal Law § 130.65[1]).

Defendant was sentenced to determinate terms of twenty-five years plus five years of post-release supervision on each first-degree burglary

count, fifteen years plus five years of post-release supervision on each second-degree burglary count, twenty-five years plus five years of post-release supervision on each first-degree assault count, seven years plus five years of post-release supervision on each second-degree assault count; twenty-five years plus five years of post release supervision on the Criminal Sexual Act count; and seven years plus five years of post-release supervision on the first-degree sexual abuse count.

The sentence on the first count, Burglary in the First Degree, was to run concurrently with the sentence on sixth count, Burglary in the Second Degree; the sentence on the seventh count, Burglary in the First Degree, was to run consecutively to the sentence on the first count and sixth count; the sentence on the eleventh count, Criminal Sexual Act in the First Degree, was to run consecutively to the sentence on the first and sixth count, and consecutively to the sentence on the seventh count; the remaining eight counts – specifically, the second count (Burglary in the First Degree), the third count (Burglary in the Second Degree), the fourth count (Assault in the First Degree), the fifth count (Assault in the Second Degree), the eighth count (Burglary in the Second Degree), the ninth count (Assault in the First Degree), the tenth count (Assault in the Second Degree), and the twelfth count (Sexual

Abuse in the First Degree), were all to run concurrently with each other and concurrently to the four consecutive sentences under the first, sixth, seventh, and eleventh counts. In total, defendant was sentenced to a state prison term of ninety years, plus twenty-five years of post-release supervision. Defendant is currently incarcerated pursuant to this judgment of conviction.

INTRODUCTION

On August 17, 2006, Cassandra Whitaker woke up and Kenneth Washington was standing in her bedroom. Cassandra Whitaker, who was an off-duty police detective at the time of the incident, reached into her night stand to grab her loaded gun. Defendant grabbed Detective Whitaker's hand with one of his hands, and repeatedly hit her in the face with his other hand until blood dripped into her eyes and mouth. Defendant took the gun from Detective Whitaker, repeatedly hit her in the head with it, pushed her into the bathroom into her bathtub, continued to hit her with the gun, and stomped on her face while she was lying in the bathtub. Defendant took some of Detective Whitaker's property, including jewelry, her gun, and her police badge, and left her bleeding in the bathtub. Detective Whitaker was treated at the hospital for her injuries, which included lacerations and serious bruising. She received stitches to her face and staples in her head to treat her wounds.

On December 5, 2006, defendant entered Luisa Gonzalez's apartment and removed some of her and her son's property, including a video gaming system, video games, sneakers, and jewelry. Ms. Gonzalez and her family were not at home at the time of the burglary.

On July 15, 2007, defendant broke the house of Stacy Brown, who was six months pregnant. Defendant forced her face down onto a pillow on her bed, and fondled her buttocks and touched his penis to them. Defendant punched and choked Ms. Brown, demanded money from her, and tied a T-shirt around her face. He dragged Ms. Brown to the kitchen, opened her refrigerator, and drank from her iced tea container. Defendant spit the iced tea at Ms. Brown, brought her to another bedroom, and choked her until she was about to pass out. Ms. Brown defecated on herself. Defendant threw her in the shower, told her to wash off, touched his erect penis to her buttocks again, and choked her until she defecated again. Then defendant put Ms. Brown on the toilet and he left the bathroom. Ms. Brown locked the bathroom door and jumped, head first, out of her bathroom window, which was eight feet above the ground. Defendant stole some of Ms. Brown's property, including jewelry, money, and sunglasses.

Neither Detective Whitaker, Ms. Gonzalez, nor Ms. Brown knew defendant, and defendant did not have permission to enter any of these women's homes.

For these acts, defendant was charged with three counts of Burglary in the First Degree (Penal Law §§ 140.30[2] and [3]); three counts of Burglary in the Second Degree (Penal Law § 140.25[2]); two counts of Assault in the First Degree (Penal Law § 120.10 [4]); two counts of Assault in the Second Degree (Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (Penal Law § 130.65[1])(Queens County Indictment Number 145/08).

Defendant proceeded to trial before the Honorable Gregory Lasak of the Supreme Court, Queens County and a jury. At the conclusion of trial, defendant was convicted of all charges and was sentenced as noted above.

On appeal, defendant raises three claims. First, defendant argues that the trial court committed reversible error when it denied defendant's challenge to two prospective jurors who had been crime victims in the past. Second, defendant claims that the trial court improperly qualified Natalyn Yanoff as an expert in the statistical significance of the DNA profile and that it improperly limited defendant's cross-examination of that witness. Finally,

defendant claims that the introduction of DNA evidence violated defendant's right to confront witnesses against him because the DNA test results were introduced through an individual who did not have first-hand knowledge of the testing of each piece of evidence. Some of defendant's claims are unpreserved and all of them are meritless. Thus, this Court should affirm defendant's judgment of conviction.

THE TRIAL

The People's Case

On August 17, 2006, at approximately 2:00 a.m., in [REDACTED] Street, off-duty detective CASSANDRA WHITAKER woke up and saw a man standing in her bedroom, searching through her jewelry box (Whitaker: 489). The man's face was covered with a black stocking cap with a knot on top of it, and his hands were covered in socks.

Detective Whitaker reached into her night stand drawer and tried to quietly remove her gun from its holster. While Detective Whitaker had her hand on the gun, defendant came over to her, grabbed her hand, and tried to wrestle the gun from her. Detective Whitaker kept at least one hand on the gun while defendant had one hand on the gun and was beating Detective Whitaker with his other hand (Whitaker: 490-93). Detective Whitaker tasted salt and

began to have trouble seeing because blood was pouring from her face and head (Whitaker: 493).

Ultimately, defendant took the gun from Detective Whitaker. He hit her in the head with it repeatedly, and pushed her in the bathroom, and told her to get in the bathtub. Defendant called Detective Whitaker a "stupid fat bitch" and "police bitch" (Whitaker: 494-95). He demanded money, asked where the safe was located, and told Detective Whitaker that he was going to kill her. Defendant pushed Detective Whitaker into her bathtub. He left the bathroom and Detective Whitaker tried to get up and escape but she slipped on her blood, which was covering her bathtub. Defendant returned and continued to hit her in the head with the gun. He pushed her down into the bathtub and stomped on her face with his feet (Whitaker: 496-98).

Defendant took Detective Whitaker's purse, turned it upside down, emptied it, searched her wallet, left the bathroom, and closed the door. She grabbed her cell phone, which had fallen into the bathtub when defendant emptied her purse, and called 911 (Whitaker: 497-99).

Detective PATRICK CURRAN, who knew Detective Whitaker from working with her on the police department, responded to her house after he received a radio run for a burglary in progress, which was updated to a run

for a police officer needing assistance (Curran: 382). Detective Curran rang Detective Whitaker's doorbell and she answered the door. She was distraught. She was covered in blood from her head to her waist, and blood was flowing from an open wound in her forehead that Detective Curran initially mistook for a gunshot wound. Her nightgown was covered in blood and her face looked like she was wearing a Halloween mask. Her hardwood floors, walls, and bathroom were all covered in her blood (Curran: 384).

Detective Whitaker told Detective Curran that she believed the intruder was still in her home, and she told him that the man had her gun. Detective Whitaker described the intruder as a black man, wearing a white T-shirt, three-quarter denim jean shorts, braids or cornrows, and a mask (Whitaker: 385).

Detective Curran called an ambulance for Detective Whitaker, and she was taken to North Shore University Hospital. Detective Curran did a vertical search of Detective Whitaker's home, hoping to find the intruder. He called for the Emergency Services Unit, the Crime Scene Unit, the Canine Unit, and the Aviation Unit to respond to the crime scene (Curran: 387).

After the sun came up, Detective Curran did a daylight search of the area surrounding Detective Whitaker's house to make sure nothing was

missed in the dark. He found a bloody white T-shirt, a bloody white sock, and a black stocking cap with a knot on top of it in front of the neighbors' homes (Curran: 398-419). Detective DANIEL BOGGIANO of the Crime Scene Unit took photographs of these items and gave them to Detective Curran, who vouchered them (Boggiano: 61922, 635). Each of these items looked like the clothing worn by the intruder. Each item was later tested by NATALYN YANOFF, an expert in DNA analysis, forensic biology, and statistical studies, and a DNA profile report was created from cells removed from the neckline of the white T-shirt (Yanoff: 922-923).

Meanwhile, Doctor SANDRA TORRES treated Detective Whitaker at North Shore Hospital post-assault for lacerations and severe bruises (Torres: 576-82). The wounds on her face were stitched by a plastic surgeon and Dr. Torres stapled the wounds on her head shut. Detective Whitaker returned home a few days after she was hospitalized and she discovered that some of her property, including jewelry, her gun, and her badge, were missing from her house. She did not return to work for almost four months. Detective Whitaker did not know defendant and had not given him permission to be in her house (Whitaker: 504, 511).

In the meantime, the police continued to investigate the case. Detective Curran took an elimination DNA swab from Detective Whitaker. Detective Whitaker viewed hundreds of photographs in an attempt to find suspects. Detective Curran visited pawn shops. None of these investigative efforts led to an arrest (Curran: 419-422).

On December 5, 2006, LUISA GONZALEZ went to work. She returned to her apartment, which was located at [REDACTED]st Street, and she noticed that somebody had broken into her apartment (Gonzalez: 677). She called the police and she and her son, LUIS ALONZO, pointed out two gloves that did not belong to anyone in their family (Alonzo: 886). Ms. Gonzalez and Mr. Alonzo noticed that some of their property, including jewelry, a new pair of sneakers, a video game system, and video games were missing from their apartment. Ms. Gonzalez and Mr. Alonzo did not know defendant. Defendant did not have permission to enter into their apartment (Gonzalez: 677-82; 689-93; Alonzo: 886-91).

Detective SHAMICKA MEADOWS dusted Ms. Gonzalez's apartment for fingerprints (Meadows: 656). She recovered the gloves from Ms. Gonzalez's apartment, and sent them to be tested (Meadows: 658). MELVIN SHAW, a criminalist with the New York City Police Department, tested the

gloves for trace evidence, in an attempt to collect hairs and fibers from the gloves (Shaw: 781). The Office of the Chief Medical Examiner later created a DNA profile report from cells removed from the gloves (Yanoff: 906).

On July 15, 2007, STACY BROWN, who was then six months pregnant, was sleeping in her house, which was located at [REDACTED] Road. Early that morning, she heard a thump, woke up, noticed that her sister's luggage had been moved, and returned to sleep (Brown: 699-708, 754-55).

At 1:00 p.m., Ms. Brown's telephone rang and she got up to answer it. Defendant appeared in her bedroom. He was wearing her white robe, had socks on his hands, and had a white towel or T-shirt covering his face. She was wearing boy shorts, a bra, and a camisole shirt. Defendant forced Ms. Brown down on to her bed, and he held her face against her pillow. Ms. Brown was not able to breathe. Defendant fondled her buttocks and he touched his erect penis to the outside of her anus (Brown: 708-14, 735). Ms. Brown thought defendant was going to rape her (Brown: 712). He asked her, "Where's the money, bitch?" (Brown: 715).

Defendant punched and choked Ms. Brown while she held her stomach and tried to shield her unborn baby from the attack. The man also demanded money and jewelry. He tied a T-shirt around Ms. Brown's face. She

was able to see down, under the shirt, but she was not able to see her attacker's face (Brown: 713-16, 766-67).

Defendant dragged Ms. Brown into the kitchen, opened her refrigerator, gulped from a container, spit iced tea on Ms. Brown and on the floor, and dropped her iced tea container on the ground. He forced Ms. Brown into another bedroom. Defendant told Ms. Brown that he was going to put her to sleep and he choked her until she was about to pass out. She defecated on herself, and defendant called her a "nasty bitch" in an angry tone of voice (Brown: 716-18, 767-69, 772).

Defendant dragged Ms. Brown to the bathroom, threw her in the shower, and told her to wash off. Ms. Brown tried to take the T-shirt off of her face, but defendant punched her in the face and prevented her from doing so (Brown: 718-21).

Defendant grabbed Ms. Brown out of the shower, dragged her back to a bedroom, and put her on the lower end of the bed. Defendant told Ms. Brown that he wanted to "lick her pussy" (Brown: 721-22). He touched his erect penis to the outside of her anus, and choked her until she could not breathe. Ms. Brown defecated again, and defendant put her on the toilet and left the bathroom. Ms. Brown kicked the bathroom door shut and locked it.

She opened a window that was in her bathtub, hoisted herself up, and dove, head first, out of the window. The window was eight feet above the ground. Ms. Brown landed on the ground, on her back (Brown: 718-730). She crawled to the front of her house, pulled herself up by grabbing her fence, and ran, covered in blood and feces, to the house of her neighbor, SOPHIA MCINTOSH (McIntosh: 807).

Ms. McIntosh opened her door, and saw Ms. Brown covered in blood and feces. Ms. Brown was screaming that someone had attacked her in her home. Defendant had ripped off Ms. Brown's camisole top and, at this point, she was only wearing her bra and underwear. Ms. Brown fell into Ms. McIntosh's foyer, grabbed her stomach, and screamed at Ms. McIntosh to call 911. Ms. McIntosh called the police, and noticed a man in a white robe scaling the fence behind Ms. Brown's house (McIntosh: 806-10).

Ms. Brown was taken to the Jamaica Hospital trauma center and was treated by Doctor LAWRENCE KRAMER, the attending physician for Obstetrics and Gynecology (Kramer: 817-19). Ms. Brown had bruising and abrasions and she was kept at the hospital for three days so that she and the unborn baby could be monitored (Kramer: 824). Ms. Brown never gave defendant permission to be in her house (Brown: 751)

Detective WILLIAM PORTER recovered the iced tea container from Ms. Brown's apartment and dusted the house for fingerprints (Porter: 845-48). Police Officer YUAN YE vouchered the iced tea container (Ye: 796-801). It was sent to the laboratory for analysis, and a DNA profile report was created from saliva recovered from the iced tea container (Porter: 849).

WILLIAM UMSTEAD, an expert in the field of fingerprint analysis, examined the fingerprints that had been lifted in this case. The prints were either of no value or did not match Kenneth Washington's fingerprints (Umstead: 600-614).

On October 10, 2007, defendant's DNA profile was found in the New York State database. Defendant's DNA profile matched the DNA profiles created from the genetic material on the T-shirt recovered from Detective Whitaker's house, the gloves recovered from Ms. Gonzalez's apartment, and the iced tea container recovered from Ms. Brown's house (Stipulation: 894-95).¹ On October 11, 2007, Detective RICHARD SANTANGELO arrested defendant (Santangelo: 871-72). Detective Curran subsequently took a DNA swab from defendant's cheek and sent it for DNA testing (Curran: 425-27).

¹ The parties also stipulated that defendant was not an identical twin.

Natalyn Yanoff, a Criminalist Level Three in the Department of Forensic Biology at the Office of the Chief Medical Examiner, and an expert in Forensic Biology, DNA analysis, and the statistical significance of DNA profiles, explained the science of DNA and DNA analysis, and the results of the laboratory tests that had been performed in this case (Yanoff: 896).

Ms. Yanoff explained that, at the time the evidence in this case was tested, OCME used thirteen standardized areas of DNA, or "loci," for analysis (Yanoff: 902-06, 926-27, 962-63). The thirteen loci contained twenty-six alleles (Yanoff: 958).

Ms. Yanoff's colleagues created a DNA profile for defendant and Ms. Whitaker. Ms. Yanoff also examined cells that were scraped from the neckline of the T-shirt that had been recovered from Ms. Whitaker's apartment. Her colleagues examined cells that had been scraped from the gloves recovered from Ms. Gonzalez's apartment, and the saliva that had been recovered from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 906-11).

Ms. Yanoff determined that a mixture of DNA was found on the T-shirt. Ms. Whitaker's DNA was present in the sample, and male DNA was also present in the sample. Ms. Yanoff was able to create a male DNA profile

from the T-shirt. One locus tested inconclusive, and results at three loci were available for only one allele, which provided full results for nine locus, and partial results at one allele at three locus points (Yanoff: 922-25, 930).

A mixture of DNA was found on the gloves recovered from Ms. Gonzalez's apartment, and a male DNA profile was created for the major donor (Yanoff: 940-45). A male DNA profile was also created from the swab that was taken from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 932-35).

Ms. Yanoff expected to see the male DNA profile that had been generated from the T-shirt, the gloves, and the iced tea container in one in more than one trillion people. She was able to conclude with a reasonable degree of scientific certainty that the DNA profiles from the T-shirt, the gloves, and the iced tea containers all came from the same individual, and that that individual was defendant Kenneth Washington (Yanoff: 945-53).

Defendant's Case

JAMES MEMISHA was working for the New York City Police Department as a detective in 2006. He brought Ernst Pope to North Shore Hospital and displayed him to Cassandra Whitaker, and had him speak so that she could hear him. Detective Whitaker told then-detective Memisha that she

was not sure if Mr. Pope was the person who had broken into her room and attacked her, but Detective Memisha indicated on his paperwork that Detective Whitaker had identified Mr. Pope. The notation in Detective Memisha's paperwork was a mistake, and Detective Whitaker had never identified Mr. Pope as the perpetrator of the crimes against her (Memisha: 1023-27).

POINT ONE

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JURORS WHO HAD NOT EXPRESSED A STATE OF MIND LIKELY TO PRECLUDE THEM FROM RENDERING AN IMPARTIAL VERDICT BASED ON THE EVIDENCE AT TRIAL (Responding to Point One of Defendant's Brief).

The court properly denied defendant's for-cause challenges to prospective jurors Marie Santana and Rosmary Lende. Ms. Santana and Ms. Lende had both indicated that they had been victims of a crime in the past, but never expressed any bias against defendant, any opinion about the case, or an inability to follow the court's instructions on the law. Nonetheless, defendant claims that the trial court improperly denied his for-cause challenges to Ms. Santana and Ms. Lende because they had never unequivocally expressed that they could decide the case impartially. Defendant's claim that Ms. Lende never

indicated that she would be a fair and impartial juror is unpreserved. In any event, defendant's claim is meritless, because, during jury selection, defendant did not elicit any bias or inability to follow the court's instructions from Ms. Santana or Ms. Lende that required either juror to be dismissed for cause. Thus, this Court should reject defendant's claim.

During the third round of voir dire, prospective juror number seven, Marie Santana, stated that, approximately eighteen years earlier, she had been the victim of a crime where her home was broken into while she was asleep (Voir Dire: 294-95). The defendant in that case fondled Ms. Santana while she was sleeping, and she woke up while she was being fondled. The man, who was a stranger to Ms. Santana, removed items from her home. She called the police, the perpetrator was arrested, she testified at a proceeding, and the defendant was found guilty.

The court noted that the charges in this case were "similar" to the case in which Ms. Santana was a victim, and asked Ms. Santana if, "[b]ased on that[, she] would have a problem sitting as a fair juror here" (Voir Dire: 295). Ms. Santana replied, "I don't think so." The court then asked, "You could be fair to both sides?" Ms. Santana replied, "Yes."

The court then called the parties and Ms. Santana up to sidebar. The court asked Ms. Santana, "Have you ever been a juror on a criminal case?" Ms. Santana said that she had not. The court asked if she or any one close to her had ever been arrested for a crime, and she replied that her nephew had been arrested about two weeks earlier and, while Ms. Santana was not sure of the exact charges against her nephew, he was probably charged with burglary and assault (Voir Dire: 296). Ms. Santana noted that she was not 100% sure but she believed that her nephew had been arrested previously for burglary and that he had violated his parole.

The court again noted, "The charge in this case is burglary and criminal sexual assault. You told us about a similar thing happening to you 18 years ago." Ms. Santana also noted that she had a niece who was raped two years earlier by a stranger but that the perpetrator was never arrested (Voir Dire: 297). The court then asked, "Based on all these experiences do you think you could sit through a case like this?" Ms. Santana replied, "I think so." The court questioned, "Be fair to both sides?" Ms. Santana again replied, "I think so." The court reinforced, "No problem?" And Ms. Santana replied, "I don't think so" (Voir Dire: 297).

Defense counsel then asked Ms. Santana if she could give her “absolute assurance you can set those aside and they wouldn’t play any role on how you react to and deal with testimony in this case?” Ms. Santana replied, “I want to say yes, but not 100% sure because I never experience – I have never been on trial except for when I had to testify. So I don’t know. I think I would, but I don’t” (Vior Dire: 298).

The court explained, and Ms. Santana agreed, “When you are a juror you have to make a determination as to the facts.” The court explained that Ms. Santana’s decision in this case would have to be on the evidence presented in the courtroom, and would have to be unaffected by anything that happened to her or her family. The court stated, “If you can do that, then you can be a juror. You have to give us your assurance about whether or not you can do that.” Ms. Santana said, “I think so.” Defense counsel asked if Ms. Santana felt comfortable that she could set aside her experiences so that they would not play a role in her evaluation of the evidence in this case. Ms. Santana stated that she would “be looking at the facts . . . of what is being presented.”

Ms. Santana explained that she had testified either at trial or before the grand jury in the case where she had been a crime victim. The court

explained that there would be witnesses in this trial who would testify about what they experienced in this case and asked, "Do you think you can objectively listen to what they say or are you going to feel some, I guess take your experience, bring it in as you are considering them?" Ms. Santana replied, "I would say no, but I can't be 100% sure." The court then explained, "The bottom line is, can you make a decision on the evidence?" And Ms. Santana stated, "Yes, I can" (Voir Dire: 299).

Later, when defense counsel questioned Ms. Santana he asked if she was confident that she could set her experiences aside and base the verdict on the evidence presented in this case. Ms. Santana replied, "I feel confident" (Voir Dire: 326).

Defense counsel challenged Ms. Santana for cause (Voir Dire: 335-36). Counsel noted that Ms. Santana was the victim of the "exact same crime that's accused here" and she "indicated that she could not be fair 100%," then indicated that she could be fair, but then returned to her position that she could not be fair 100%, stating that twice. In addition, counsel argued, she and her niece were both victims of similar crimes (Voir Dire: 335-37).

The People argued that, in totality, Ms. Santana had unequivocally expressed that she had an impartial state of mind (Voir Dire: 336). The People

noted that Ms. Santana expressed that she could put her bad experience as a crime victim behind her and could serve as a juror in this case (Voir Dire: 337). In addition, Ms. Santana indicated that she would try to be fair and that she could be fair (Voir Dire: 336-37). The court ruled, "[Ms. Santana] was questioned extensively by the court. More so than usual and she never answered any question that the court felt rose to the level of a cause challenge. The bottom line was that she said she could be fair in this case despite the fact that she had an incident similar to this 18 years ago. Her nephew is a burglar" (Voir Dire: 337). Defense counsel stated, "She didn't give an unequivocal assurance because she said not 100% two times." The court denied defendant's for-cause challenge, and defendant exercised a peremptory challenge against Ms. Santana (Voir Dire: 338).

During the same round of voir dire, prospective juror number eleven, Rosemary Lande, indicated that she had been a crime victim on two separate occasions, once when her car was vandalized, and once when she was robbed at knife point in an elevator by two men (Voir Dire: 310-11, 327). The robbery took place about twenty years before defendant's trial, in an office building in lower Manhattan, and Ms. Lande was able to escape (Voir Dire: 327). Ms. Lande did not know if anyone had been arrested in connection with

that robbery (Voir Dire: 311). The court asked Ms. Lande if she could place her memory of the robbery aside, sit and listen to the evidence in this case, base the verdict only on the evidence, and not be affected by what happened to her. Ms. Lande replied that she believed that she could (Voir Dire: 311).

Defense counsel questioned Ms. Lande and asked if she felt confident that she could set her experience as a crime victim aside (Voir Dire: 327). Ms. Lande replied, "I believe so." Counsel explained that he wanted Ms. Lande's assurance that she could set her experience aside, and he asked, "As you sit her now, you feel confident you can set that aside or are you not completely sure?" Ms. Lande replied, "I believe I can set it aside" (Voir Dire: 328).

Defendant exercised a for-cause challenge to Ms. Lande, and argued that she did not give an "unequivocal assurance that she could set aside her own experiences and be fair" (Voir Dire: 338-39). Counsel argued that she qualified her statements that she could be fair with words like "believe" and "think," which, counsel argued, did not constitute an unequivocal assurance of impartiality. The People replied that Ms. Lande indicated that she could be fair and never indicated that her past experiences would cloud her view of the evidence in this case.

The court brought Ms. Lande out to be questioned again. The court stated its opinion that Ms. Lande had indicated her belief that she could be fair and she replied, "That is correct" (Vior Dire: 340). The court asked if she was hesitant about her ability to be fair and she replied that there is "some hesitancy" because in her mind, Ms. Lande saw the robbery "like it [was] yesterday." Ms. Lande explained, "So I use the word believe in exactly the way that it's meant. I believe I could, but that's not to say definitively that I could be 100% not thinking about it and being 100% fair on that account." The court explained that it did not expect Ms. Lande to forget about her experiences but, if she were selected as a juror she would have to "come in, sit and listen to the testimony, view the evidence and make a determination only on the evidence. Only on the evidence. Place [her] memory of any bad incident aside." The court asked Ms. Lande, "Can you do that or can't you do that?" Ms. Lande replied, "I would say I could do that." Defense counsel indicated that he had no questions for Ms. Lande (Vior Dire: 340).

The court denied defendant's challenge for cause (Vior Dire: 341). Defense counsel stated that Ms. Lande expressed hesitancy about her ability to set her experiences aside. The court stated, "I asked her whether or not she

could make a determination only on the evidence and not be affected and she said she could. She didn't say I think I could. She said she could."

Counsel stated that Ms. Lande first expressed hesitancy, and only when the court followed up and asked her again "she just [said] yes, I can." Counsel argued that it was not proper for the court to ignore Ms. Lande's statement that she had some hesitancy. The court explained, "I am not ignoring the answer. I framed the issue of whether or not she could be a fair juror. Everyone has had an experience like that, it seems, as she said here, it seems like yesterday. She started talking about an enclosed elevator. Then I asked her can you put memory of that aside and base your verdict only on the evidence and she said she could. I gave you the opportunity to ask more questions."

The People argued that the issue was not whether Ms. Lande had hesitancy, it was whether or not she could put that aside and be fair. The People argued that Ms. Lande had expressed that she could sit as a juror, look at the facts, and make a fair decision (Voir Dire: 343). Defense counsel stated that he did not believe that Ms. Lande stated unequivocally that she could be fair.

The court denied defendant's for-cause challenge to Ms. Lende, and defendant used a peremptory challenge to remove her from the jury (Voir

Dire: 343-44). Defendant used all fifteen of his peremptory challenges during voir dire.

Defendant's claim about the court's for-cause ruling with respect to Ms. Lande is unpreserved for appellate review. And, in any event, the court's rulings on the for-cause challenges to both Ms. Lande and Ms. Santana were correct and should be upheld.

First, this Court should reject defendant's claim that Ms. Lende never was unequivocal when assuring the court that she could be fair and impartial, because it was unpreserved for this Court's review. When counsel challenged Ms. Lende for cause, he stated that Ms. Lande first expressed hesitancy, and only when the court followed up and asked her again "she just [said] yes, I can." Counsel argued that it was not proper for the court to ignore Ms. Lande's initial statement that she had some hesitancy. But because defendant specifically noted at trial that Ms. Lande had unequivocally stated, "Yes, I can," in response to the court's inquiry over whether or not she could be fair, he cannot now claim on appeal that the court should have granted his for-cause challenge because Ms. Lande had not given sufficient assurances regarding her impartiality.

Nor should this Court review defendant's claim regarding Ms. Lande in the interest of justice because it is meritless. And defendant's claim that the trial court erred in declining to grant his for-cause challenge to prospective juror Maria Santana should be rejected by this court because it is meritless as well.

A challenge for cause, pursuant to section 270.20(1)(b) of the Criminal Procedure Law, is an objection to a prospective juror which may be made on the ground that the juror has a state of mind that is likely to preclude him or her from rendering an impartial verdict based upon the evidence adduced at trial. Most, if not all, jurors bring some degree of predisposition with them when they enter the jury box. *People v. Harris*, 247 A.D.2d 630 (2d Dept. 1998). A potential juror's discharge for cause, however, is warranted only when it is shown that there is a "substantial risk that such predisposition will affect the ability of the particular juror to discharge his responsibilities." *People v. Johnson*, 94 N.Y.2d 600, 613 (2000) (quoting *People v. Williams*, 63 N.Y.882, 885 [1984]). Indeed, if the rule were otherwise, it would require the discharge of every potential juror who disclosed anything but a total absence of life experience and opinion.

The decision as to whether a prospective juror can provide "reasonable jury service" in a case is left largely to the discretion of the trial court, for it had the unique opportunity to observe the character and demeanor of the prospective juror during the *voir dire* process. *Johnson*, 94 N.Y.2d at 613; *Williams*, 63 N.Y.2d at 885; *People v. Middleton*, 220 A.D.2d 202 (2d Dept. 1995); *People v. Pagan*, 191 A.D.2d 651 (2d Dept. 1993). In this regard, if potential jurors "doubt their ability to be fair in the case," the trial court should elicit "some unequivocal assurance of impartiality." *Johnson*, 94 N.Y.2d at 616. It is for the trial court to decide if it is even appropriate to elicit such an unequivocal assurance and whether to excuse the juror if that is appropriate. *Id.* When evaluating a prospective juror's statements to determine whether the juror has a state of mind that would prevent him or her from rendering an impartial verdict based on the evidence, the appellate court must consider all the statements made by the juror as a whole, not just "snippets or characterizations" of the *voir dire*. *Id. People v. DeLaCruz*, 223 A.D.2d 472, 473 (2d Dept. 1996).

Moreover, with the elimination of the expurgatory oath requirement from section 270.20, it is for the trial court to determine whether the juror's choice of words express such an assurance. *People v. Arnold*, 96 N.Y.2d 358, 362 (2001); *Johnson*, 94 N.Y.2d at 614. Indeed, the guiding

principle defined by section 270.20 and case law is that “when potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must *in some form* give unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence.” *Johnson*, 94 N.Y.2d at 614 (emphasis added). Thus, neither the statute nor case law mandates that a potential juror utter particular words in expressing an unequivocal assurance of impartiality. *People v. Chambers*, 97 N.Y.2d 417 (2002).

In this case, the court acted well within its discretion when it correctly denied defendant’s challenge of prospective juror Ms. Lende. Her responses, viewed in their entirety, did not show that she possessed “a state of mind that [was] likely to preclude her from rendering an impartial verdict based upon the evidence at trial.” C.P.L. § 270.20(1)(b). Despite the fact that Ms. Lende indicated that she had been a crime victim, she indicated that she believed that she believed that could place her memory of the robbery aside, sit and listen to the evidence in this case, base the verdict only on the evidence, and not be affected by what happened to her (Voir Dire: 311, 327-28). And, after the court brought Ms. Lande out to be questioned a second time, the court explained to Ms. Lande that it believed that she had indicated her belief that she

could be fair, and she replied, "That is correct" (Vior Dire: 340). And, even though Ms. Lende expressed "some hesitancy" about her ability to put her past out of her mind during deliberations, and also expressed that she was not able to "say definitively that I could be 100% not thinking about it and being 100% fair on that account," she did ultimately indicate that she could fairly base her verdict on this case on the evidence. In fact, after the court explained that it did not expect Ms. Lande to forget about her experiences but, if she were selected as a juror she would have to "come in, sit and listen to the testimony, view the evidence and make a determination only on the evidence. Only on the evidence. Place [her] memory of any bad incident aside." The court asked Ms. Lande, "Can you do that or can't you do that?" Ms. Lande definitively replied, "I would say I could do that."

Under these circumstances, any arguable doubt about Ms. Lende's ability to fairly judge the case on the law and the evidence because of her status as a crime victim twenty years before this case was dispelled. Taken in context, Ms. Lende's responses showed that there was no "substantial risk" that she was possessed of any predisposition that would affect her ability to fairly judge this case. *See Johnson*, 94 N.Y.2d at 613, 616; *Chambers*, 97 N.Y.2d at 419. Thus, the court properly denied defendant's for-cause challenge to Ms. Lende. *See*

People v. Johnson, 40 A.D.3d 1011 (2nd Dept. 2007); *People v. Rolle*, 4 A.D.3d 542 (2nd Dept 2004).

Similarly, in this case, the court acted well within its discretion when it correctly denied defendant's challenge of prospective juror Ms. Maria Santana. Ms. Santana's responses, viewed in their entirety, did not show that she possessed "a state of mind that [was] likely to preclude her from rendering an impartial verdict based upon the evidence at trial." C.P.L. § 270.20(1)(b). Despite the fact that Ms. Santana had indicated that she had been a crime victim in a crime similar to the ones charged in this case, Ms. Santana unequivocally stated that she could be "fair to both sides" (Voor Dire: 296).

Ms. Santana subsequently qualified that she thought she could be fair to both sides, and defense counsel asked Ms. Santana if she could give her "absolute assurance you can set those aside and they wouldn't play any role on how you react to and deal with testimony in this case?" Ms. Santana explained that she "want[ed] to say yes" but she was not 100% sure because she never experienced being a juror before, which made it difficult to know for sure if she could evaluate the evidence in this case without considering her past victimization. She also explained that she thought she could be fair. (Vior Dire: 298).

The court then explained, and Ms. Santana agreed, "When you are a juror you have to make a determination as to the facts." The court told Ms. Santana that her decision in this case would have to be on the evidence presented in the courtroom, and would have to be unaffected by anything that happened to her or her family. The court stated, "If you can do that, then you can be a juror. You have to give us your assurance about whether or not you can do that." Ms. Santana said, "I think so." Ms. Santana also stated in response to defense counsel's question that she would base her determination of the facts on the evidence that was presented in this case. And she ultimately unequivocally stated that she would make her decision in this case on the evidence that was presented at trial (Voir Dire: 299). She unequivocally reiterated this position when defense counsel questioned her and she stated that she was "confident" that she could set her experiences aside and base the verdict on the evidence presented in this case (Voir Dire: 326).

Under these circumstances, any arguable doubt about Ms. Santana's ability to fairly judge the case on the law and the evidence because of her status as a crime victim eighteen years before this case was thereby dispelled. Taken in context, Ms. Santana's responses showed that there was no risk at all that she was possessed of any predisposition that would affect her

ability to fairly judge this case. *See Johnson*, 94 N.Y.2d at 613, 616; *Chambers*, 97 N.Y.2d at 419. Rather, Ms. Santana's hesitancy was unrelated to any actual belief that she could not be fair – it was related to the belief that she could not give an absolute guarantee because she had never been a juror before and was loath to promise in the absence of having been put to the test. Thus, the court properly denied defendant's for-cause challenge to Ms. Santana. *See People v. Johnson*, 40 A.D.3d 1011 (2nd Dept. 2007); *People v. Rolle*, 4 A.D.3d 542 (2nd Dept 2004).

Nevertheless, defendant claims that Ms. Lende and Ms. Santana never gave unequivocal assurances that they could be impartial (Defendant's Brief at 63, 67-69). Defendant points to snippets of the voir dire – where Ms. Lende indicated that she was not sure that she “could be 100% not thinking about [having been robbed] and being 100% sure on that account,” and where she stated that, although she believed she could be fair, she had some “hesitancy” – to support his argument that Ms. Lende never unequivocally expressed that she could be fair. Similarly, defendant points to snippets of the voir dire – where Ms. Santana indicated that she “thought” she could be fair, and that she was not 100% sure that she could set aside her past experiences while evaluating the evidence in this case because she had never been put to the

test – to support his argument that Ms. Santana never unequivocally expressed that she could be fair and impartial.

Defendant ignores, however, that, when evaluating a prospective juror's statements to determine whether the juror has a state of mind that would prevent him or her from rendering an impartial verdict based on the evidence, it is proper for courts to consider all of the statements made by the juror as a whole, and not just "snippets or characterizations" of the *voir dire*. *Johnson*, 94 N.Y.2d at 616-17; *DeLaCruz*, 223 A.D.2d at 473. Defendant further ignores that neither the statute governing for-cause challenges nor case law mandates that a potential juror utter particular words in expressing an unequivocal assurance of impartiality. *Chambers*, 97 N.Y.2d at 419. Indeed, the Court of Appeals has specifically rejected defendant's argument that words "think" or "try" are "talismanic" words that automatically make a statement equivocal. *Id.* Moreover, the Court of Appeals has held that, even if some of a juror's answers raise doubts about her ability to be impartial, when the record as a whole supports that the juror could render an impartial verdict, it is proper for the trial court to deny a challenge for cause. *Id.*; *Johnson*, 40 A.D.3d 1011, *supra*; *Rolle*, 4 A.D.3d 542, *supra*.

As discussed above, Ms. Lende indicated that she believed she could be fair, set her status as a crime victim aside, and base her verdict in this case on the evidence presented at trial (Voir Dire: 328. 339). And Ms. Santana indicated that she believed that she could be fair, and that she could base her decision in this case on the evidence presented at trial, as opposed to her past experiences. In fact, Ms. Santana indicated that she was “confident” that she could set aside her experience as a crime victim and base her verdict on the trial evidence. Furthermore, when the jurors said they could not be 100% fair, neither was expressing a belief that she could not be fair – both were expressing the idea that, until one has actually been tested, there is no such thing as a 100% guarantee of a reaction to a situation in the future. Thus, contrary to defendant’s claim, and reviewing Ms. Lende’s and Ms. Santana’s responses as a whole, the trial court’s determination that Ms. Lende and Ms. Santana had not expressed a state of mind that disqualified either of these prospective jurors from service on this case was correct.

In sum, the trial court properly denied defendant’s challenge for cause to Ms. Santana and Ms. Lende because neither prospective juror expressed any bias against defendant, any opinion about the case, or an inability to follow the court’s instructions on the law. Indeed, Ms. Santana and Ms.

Lende's responses indicated that they would be fair and impartial jurors, and counsel acknowledged as much at trial with respect to Ms. Lende. Thus, this Court should reject defendant's claim that the trial court improperly denied defendant's for-cause challenges to Ms. Santana or Ms. Lende.

POINT TWO

THE TESTIMONY OF THE DNA EXPERT WAS PROPERLY ADMITTED AT TRIAL AND THE TRIAL COURT PROPERLY LIMITED DEFENDANT'S CROSS EXAMINATION OF THIS WITNESS TO RELEVANT ISSUES THAT WOULD NOT MISLEAD THE JURY (Responding to Defendant's Brief, Point Two).

The trial court properly qualified Natalyn Yanoff as an expert in forensic biology, DNA analysis, and the statistical significance of the DNA profile. In addition, the trial court properly limited defendant's cross-examination of the witness to relevant issues that would not mislead the jury. Nevertheless, defendant claims that Ms. Yanoff should not have been qualified as an expert in the statistical significance of the DNA profile because her education and training was not adequate to make her an expert on this topic. He also claims that he should have been permitted to cross-examine Ms. Yanoff on the results of comparisons of DNA samples in the DNA databases in Arizona, Illinois, and Maryland because, according to defendant, these comparisons have

“raised substantial questions in the scientific community” about the interpretation of DNA profiles.

Defendant’s challenge to Ms. Yanoff’s expert qualification should be rejected. The trial court, in a proper exercise of its discretion, qualified Ms. Yanoff as an expert to testify about the statistical significance of the DNA profile after she testified that she received training on this matter and used it in practice in connection with her work responsibilities. Thus, defendant’s challenge to Ms. Yanoff’s expert qualification is meritless and it should be rejected by this Court.

This Court should also reject defendant’s claim that his cross-examination of Ms. Yanoff was improperly limited because it, too, is meritless. Indeed, it was well within the trial court’s discretion to limit cross-examination of this witness to areas that were relevant to the case and not misleading to the jury. In addition, defendant’s challenge to the limitation on his cross-examination of Ms. Yanoff is not preserved for review by this Court. While defendant argued in the court below that he wanted to cross-examine Ms. Yanoff about the internal comparisons done in DNA databases because it undermined the reliability of Ms. Yanoff’s statistical analysis in this case, defendant never made an offer of proof explaining to the court how those

comparisons could competently and relevantly undermine Ms. Yanoff's testimony.

Accordingly, the trial court did not abuse its discretion when it qualified Ms. Yanoff an expert on the statistical significance of the DNA profile or when it limited defendant's cross-examination of this witness. Defendant claim to the contrary should be rejected by this Court.

A. The Trial Court Qualified Ms. Yanoff as an Expert on the Statistical Significance of the DNA Profile in a Proper Exercise of Its Discretion.

The trial court properly qualified Natalyn Yanoff as an expert in forensic biology, DNA analysis, and the statistical significance of the DNA profile. The qualification of a witness as an expert is left to the discretion of the trial court, and is subject to review only if the court has made a serious mistake, committed an error of law, or abused its discretion. *Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410, 414 (1971); *People v. Robinson*, 166 A.D.2d 543 (2nd Dept. 1990). An expert witness should "be possessed of the requisite skill, training, education, knowledge, and experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Mattot v. Ward*, 48 N.Y.2d 455, 459 (1979). There is no specific formula, however, used

to determine how an expert must acquire his or her skill. *Meiselman v. Crown Heights Hosp.*, 285 NY 389, 399 (1950).

Practical experience in a specialized field can be a source of a witness's expertise. *Capara v. Chrysler Corp.*, 52 N.Y.2d 114, 1212 (1980). In fact, "long observation and actual experience without actual study of the subject" may qualify a witness as an expert on the subject. *Meiselman Crown Heights Hosp.*, 285 NY at 399.

In this case, the trial court properly qualified Natalyn Yanoff as an expert witness in forensic biology, DNA analysis, and the statistical significance of the DNA profile. Ms. Yanoff testified that she worked as a Criminalist Level Three at the Office of the Chief Medical Examiner's Office, where, as part of her job responsibility, she managed her own caseload of interpreting DNA results, wrote DNA reports, and supervised employees on DNA techniques that they performed. Ms. Yanoff had held that position for nine years, and had performed or supervised "thousands" of DNA analysis and comparisons. She was subjected to proficiency tests that were given by an outside agency, which checked her ability to perform tests and determine the correct conclusions. Ms. Yanoff never failed a proficiency examination.

Ms. Yanoff testified that she held a bachelor of science in analytical chemistry from Moscow, Russia, and a bachelor of science in molecular biology from Long Island University. She did not have a degree in statistics, but had taken one college course in statistics at Long Island University, and had also taken a population statistics course with the Office of the Chief Medical Examiner, which provided continuing education on statistical analysis. In her job training, Ms. Yanoff learned statistical theories, and how to calculate statistics. She was expected to understand how statistics are calculated, had been trained by a statistician, and used population statistics in her work at the laboratory. Ms. Yanoff had testified as an expert in the field of DNA analysis and forensic biology approximately forty-five times before.

Defendant did not object to Ms. Yanoff being declared an expert in forensic biology and DNA analysis, but objected to her being qualified as an expert in the area of the statistical significance of DNA profiles (Yanoff: 901). The court qualified Ms. Yanoff as an expert in all three areas.

The trial court's ruling was proper. Ms. Yanoff's education, which included her study of statistics in college, as well as her study in statistical analysis as part of her continued job training, supports the trial court's ruling. In addition, Ms. Yanoff's practical work experience in the extremely

specialized field of DNA included determining the significance of population statistics with respect to DNA profiles. This, too, supports that the trial court's ruling was proper. In fact, based on her education and experience, Ms. Yanoff was fully qualified to render an expert opinion about the probabilities of a DNA match in this case. *See People v. Terry*, 286 A.D.2d 452 (2nd Dept. 2001). Thus, the trial court properly exercised its discretion in qualifying her as an expert witness.

Nevertheless, defendant claims that Ms. Yanoff was not properly qualified as an expert because she was not a statistician and did not have a degree in statistics. But Ms. Yanoff was not qualified by the court as an expert statistician; rather, she was qualified as an expert declared an expert in forensic biology, DNA analysis, and the *statistical* significance of DNA profiles. As discussed above, Ms. Yanoff both studied this limited area of statistics, and applied it as part of her job in an extremely specialized field. Accordingly, and contrary to defendant's claim, Ms. Yanoff was properly qualified.

In short, Ms. Yanoff was properly qualified as an expert witness in this case.

B. The Trial Court Properly Limited Defense Counsel's Cross-Examination when the Questions Sought To Elicit Irrelevant and Misleading Answers.

The trial court's limitation of a single area of cross-examination during defendant's cross-examination of Ms. Yanoff was a proper exercise of the court's discretion.

At trial, defense counsel asked Ms. Yanoff if she was aware if the DNA database used by her office had "ever compared all the profiles in the database to each other?" She replied, "There is no point of comparing profiles to each other." Counsel continued, "I take the answer then is no?" And Ms. Yanoff responded, "That is meaningless." Counsel repeated, "I take it the answer is no then?" And Ms. Yanoff replied, "No" (Yanoff: 964-65).

Counsel then asked, "Are you aware of in the state of Arizona the profiles in that state, the database were compared to one another in 2004, are you aware of that?" Ms. Yanoff responded, "I am aware." The People objected to defendant's question, the court sustained the objection, and counsel asked to approach. He explained at sidebar that he was attempting to challenge the credibility or reliability of the statistical analysis that Ms. Yanoff applied by asking about the statistical results of databank comparisons that "do not comport with [Ms. Yanoff's] findings in New York State." Counsel argued

that, because Ms. Yanoff testified that she was aware of Arizona comparisons, he should be permitted to ask her about it, but if she were unaware of the database comparisons then "obviously" he would not be able to go into it. Counsel stated that the purpose of the questioning was to "challenge the reliability of Ms. Yanoff's statistical analysis" (Yanoff: 965).

Counsel explained that "in Arizona there were 120 compared the profiles in their system to one another. There were 122 matches in nine locations. . . . 65,000 profiles in the Arizona state database and there were 20 matched and I want to ask her about Illinois and Maryland which also did comparisons" (Yanoff: 966). The court told counsel to move on to another area.

The following day, counsel noted that he objected to the court's ruling that counsel could not ask Ms. Yanoff about the internal databank comparison done in other states on both due process and confrontation grounds.

To begin, defendant's challenge to the limitation of his cross-examination of the DNA expert's testimony is not preserved for this Court's review. To raise a challenge to the testimony of an expert witness on appeal, a defendant must raise the same, specific claim before the lower court that he raises on appeal. *See* C.P.L. § 470.05(2); *People v. Garcia*, 83 N.Y.2d 817 (1994)(objection to expert witness's testimony must be preserved for appellate

review); *People v. Geraci*, 254 A.D.2d 522 (3d Dept. 1998). Although defendant objected to the limitation of his cross-examination in the court below, he did not preserve his current challenge to the limitation on his cross-examination for review on appeal, because he never made an adequate offer of proof explaining the relevance of the information upon which he sought to examine Ms. Yanoff. *People v. Pereyra*, 63 A.D.3d 545 (1st Dept. 2009)(defense must make adequate offer of proof to preserve improper limitation on cross-examination claim); *People v. Hayes*, 36 A.D.3d 629 (2nd Dept. 2007); *People v. Ramos*, 273 A.D.2d 10 (1st Dept 2000). On appeal, defendant argues that he was entitled to cross-examine Ms. Yanoff on internal DNA database comparisons in Arizona, Illinois, and Maryland. Defendant argues that the Arizona comparison produced twenty matches at ten loci, Maryland produced eleven matches at ten or more loci, and Illinois produced 903 matches at nine or more loci (Defendant's Brief at 27).

But in the court below, defendant did not refer at all to specific data produced by the Illinois and Maryland internal DNA database comparisons upon which he sought to examine Ms. Yanoff. But because the expert had already testified that the comparisons in this case matched at least twelve locations, the court below had no reason to believe that these studies were

relevant. In addition, the only specific information defendant provided to the court below was that he intended to cross-examine Ms. Yanoff about DNA matches in the Arizona database at “nine locations,” but he did not explain to the court that the Arizona comparisons also contained information about matches at ten locations, and, according to defendant’s appellate brief, the Illinois and Maryland comparisons produced matches at “nine or more loci” and “ten or more loci,” respectively. Thus, the specific statistics relied on by defendant on appeal should not be considered by this Court because he never presented them to the court below.

In addition, defendant only generally argued in the court below that he wanted to cross-examine Ms. Yaroff on the Arizona, Maryland, and Illinois comparisons to “challenge the reliability of her statistical analysis.” But he did not argue, as he now does on appeal, that the appropriate method of determining DNA population studies is the subject of “great scientific debate.” Nor did he argue the possibility that other statistical formulas, such as “Bayes Therom,” are the preferred formula to be used when calculating population statistics. In fact, defendant did not cite to one scientific, mathematic, or legal article in the court below to support that any reliable statistical method of comparison – other than the one used by the Office of the Chief Medical Examiner in this case –

exists and, accordingly never brought to the lower court's attention that there is any scientific debate over DNA population statistics. Thus, this Court should not consider this argument on appeal.

Nor should the Court reach defendant's claim in the interest of justice because it is meritless. In this case, the trial court properly limited defendant's cross-examination of Ms. Yanoff on the internal DNA databank comparisons that had been done in other states. The right to cross-examination is not unlimited, and it is within the sound discretion of the trial court to limit the nature and extent of cross-examination. *People v. Standard*, 42 N.Y.2d 74, 83 (1977); *People v. Duffy*, 36 N.Y.2d 258, 262 (1975); *People v. Schwartzman*, 24 N.Y.2d 241, 245 (1969), *cert. denied*, 396 U.S. 846 (1969). A trial court has wide latitude and broad discretion to limit cross-examination when questions are of no relevance to the case, concern issues collateral to the main issue in the case, and pose a danger of misleading the jury. *See People v. Sorge*, 301 N.Y. 198, 202 (1950); *People v. Rivera*, __ A.D.3d __, 2012 N.Y. App. Div. LEXIS 5751 (2nd Dept. 2012); *People v. Paxiao*, 23 A.D.3d 677 (2nd Dept. 2005). When there has been no improvident exercise of discretion, the trial court's determination should not be disturbed on appeal. *People v. Sorge*, 301 N.Y. at 202; *People v. Griffin*, 194 A.D.2d 738, 739 (2d Dept. 1993).

In this case, the trial court properly exercised its discretion when it sustained the prosecutor's objection to a single line of questioning by defense counsel because defendant did not establish that this line of questioning was admissible. In order to admit evidence through an expert witness, the party seeking to offer the examine the witness must show that the information used is generally reliable. *See People v. Wesley*, 83 N.Y.3d 417 (1994); *People v. Middleton*, 54 N.Y.2d 42 (1981).

Here, defendant sought to cross-examine the People's expert about internal comparisons within three out-of-state DNA databases. But the expert had already testified that the statistical method used in this case is the same theory used in every laboratory in the United States, and Europe, and later testified that it is the same theory used in laboratories throughout the world (Yanoff: 961, 1013). This testimony established the acceptance and reliability of the method used to calculate population statistics in this case. Ms. Yanoff's testimony also discredited the statistical method that defendant sought to explore by stating that "there is no point of comparing profiles to each other" and that such a comparison is "meaningless" (Yanoff: 964). Thus, the only evidence in the record supports that the statistical methods used in the Arizona, Maryland, and Illinois comparisons were not reliable. Even if cross-

examination does not quite require a *Frye* hearing, there must be *some* showing of reliability and acceptance of the proposed cross-examination material. Otherwise, defendant could seek to undermine well-tested theories with any crackpot idea. As discussed above, defendant never made an offer of proof that showed that the statistical methods he sought to explore were reliable, or that they were at all accepted in the scientific community.

Nor could he. In fact, even the articles defendant relies upon on appeal do not support that the statistical method used in the internal database comparisons are generally reliable or accepted by the scientific community. For example, defendant cites to an article from the Cornell Journal of Law and Public Policy in which, Keith Devlin, a Stamford University mathematician calls random-match probabilities "total nonsense" and "damned lies," and believes that it is "disgraceful" that courts admit statistics involving quadrillionths and septillionths. But, that same law journal article points out that Devlin's opinion that the reliability of random-match statistics have been contradicted or undermined is based on one "informal and unpublished study" of offender databases. Moreover, defendant attempts to state that Devlin attacks the reliability of current DNA profiling. But, according to the law review article cited by defendant, Devlin does not call statistics involving the

trillions “total nonsense” – which is the accepted standard used by every laboratory in the world.

Similarly, in the Los Angeles Times article cited by defendant, Thomas Callahan, the head of the FBI CODIS unit, called the comparisons in Arizona “misleading” and “meaningless,” which supports that at least the FBI has determined that it is not reliable to compare database data to come up with DNA population studies data. That article also points out that most experts agree that the results of the Arizona comparison were to be expected because of the “unusual” way the scientist in Arizona searched for them. Because defendant did not, and could not, have established in the court below that the statistical method he sought to explore was reliable or generally used he did not establish that Ms. Yanoff’s testimony about the comparison results in Arizona would have been evidence generally relevant to undermine the statistical method used by the DNA expert. *See generally, People v. Hayes*, 36 A.D.3d 629 (2nd Dept. 2007)(proper limitation on cross-examination where offer of proof was speculative and evidence sought to be elicited was conjectural).

Indeed, simple logic explains why the methodology used in the three states does not, as defendant argues, “raise[] substantial questions in the scientific community.” The study took a pool of people and compared their

DNA to each other at a low number of loci. Thus, the odds, assuming 65,000 or so people, that 120 would match were actually quite high. But the report does not stand for the proposition that all of the 120 matched each other, in other words, that 120 people had nine identical loci. Rather, the matches were one to the other – sixty couples, in effect. Third, the study did nothing to eliminate matches among relatives. It relied on its own probabilities, such as that a black and white match were likely to be unrelated. But the history of the United States demonstrates otherwise – that black and white people often have common ancestors. Finally, it is not clear that the study did anything to eliminate duplicates, meaning multiple DNA profiles of the same person arrested multiple times, especially under different names.

More important, defendant failed to establish that the results of the Arizona, Maryland, and Illinois cases were relevant to this specific case. In this case, the DNA profiles from the gloves recovered from Ms. Gonzalez's apartment and the iced tea container recovered from Ms. Brown's apartment matched defendant's DNA profile at thirteen loci. The DNA profile created from the T-shirt recovered from the area around Detective Whitaker's apartment matched defendant's DNA profile at twelve loci, and was inconclusive at one

locus.² Ms. Yanoff never offered an opinion on the frequency with which a DNA match at nine loci is expected to occur within the general population. Thus, in this case, Ms. Yanoff's answers to defendant's questions about statistical information related to internal DNA database matches at only nine loci would have been completely irrelevant because the evidence in this case matched at twelve and thirteen loci and any data on matches at nine loci could not undermine evidence matched at thirteen or twelve loci.

Moreover, the court properly disallowed evidence pertaining to the Arizona, Maryland, and Illinois comparisons showing the number of profiles in that database that partially matched each other because it would have completely misled the jury. First, as discussed above, in this case, defendant's profile matched the evidence at twelve and thirteen loci, as opposed to nine or ten loci. A match at the higher number exponentially increases the odds against a coincidental match, and thus, matches at lower numbers would have confused the jury since those numbers had no bearing at all on this case. And, in this case, the DNA profiles that were created from the evidence were actually

² Nine of the loci in the DNA profile created from the t-shirt matched defendant's profile at two alleles. Three of the loci in the DNA profile created from the t-shirt contained information on only one allele and were inconclusive as to the other allele. The loci with information on only one allele are still compared to defendant's DNA profile, and there was a match at those three locations. Thus, in this case, defendant's DNA profile matched the DNA profile of the t-shirt at twelve loci.

compared against every profile in the New York State DNA database. All three cases remained open until October 2007 when all three profiles matched only one person's profile in the New York State DNA database – Kenneth Washington's. Thus, in this case the evidence was actually compared to the hundreds of thousands of other DNA profiles in the database and they matched just one. To suggest that the DNA profiles in this case would have matched more people if they had been entered into the database and then internally compared to the other samples within it would be false and misleading to the jury.

Furthermore, the court's decision to sustain the objection to the line of questioning on out-of-state DNA database comparisons did not deny defendant the right to present a defense. Although, as discussed above, defendant was properly limited to cross-examination on areas that were relevant and not misleading or confusing to the jury, defendant was still free to call an expert to testify about the studies that took place in Arizona, Maryland, and Illinois, assuming he could have shown that the statistical studies he sought to explore were not junk science. If defendant had gone this route, he would have been free to argue that the statistical studies testified to at trial by Ms. Yanoff

that have been in use and accepted by the scientific community have been undermined by other reliable studies.

In short, the trial court appropriately prevented defendant from asking the People's DNA expert witness questions that would have called for irrelevant and misleading answers on a statistical method that was not established to be reliable. Accordingly, this Court should reject defendant's claim.

POINT THREE

**THE DNA EVIDENCE WAS PROPERLY
ADMITTED INTO EVIDENCE AT TRIAL AND
DEFENDANT'S CLAIM TO THE CONTRARY
IS WITHOUT MERIT (Answering Defendant's
Brief, Point Three).**

The DNA evidence was properly admitted at trial through the testimony of a Criminalist Level Three at the Office of the Chief Medical Examiner (OCME), who performed the DNA testing on the T-shirt recovered at the crime scene in Ms. Whitaker's case, and interpreted the results generated by other OCME employees in Ms. Gonzalez's and Ms. Brown's cases. Defendant nevertheless argues that the introduction of the DNA evidence violated defendant's right to confront witnesses against him, because the DNA testing was introduced through an individual who did not have first-hand

knowledge of the testing of each piece of evidence. But, as defendant concedes, under current New York Court of Appeals precedent, the evidence was properly admitted. And the evidence was properly admitted under *Williams v. Illinois*, which was decided by the Supreme Court after defendant filed his brief in this case, as well.

In this case, the People sought to introduce into evidence three files that were generated by the OCME laboratory as business records (Yanoff: 907-09). Ms. Yanoff testified that each of the three cases on trial had a team of DNA analysts working on it, and each case was assigned an interpreting analyst, whose job was to review all of the paperwork in the case file and to make conclusions on the findings (Yanoff: 910). Ms. Yanoff testified that she did not prepare every document that was contained in each case file, but that she did personally examine the evidence related to case number FB06-1479 (Cassandra Whitaker's case), and she personally prepared the reports on all three cases (Yanoff: 909-912). Defense counsel objected to the admission of the files on the ground that their admission violated the New York State and Federal constitutions because the file contained paperwork that was prepared based on work done by other people who the defense would not have an

opportunity to confront (Yanoff: 912-13). The court overruled defendant's objection, and admitted the three files into evidence (Yanoff: 914-16).³

The admission of the DNA evidence here did not violate *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court reinterpreted the confrontation clause, holding that, in criminal cases, the prosecution may not use any "testimonial" hearsay against the accused unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. The ruling under *Crawford*, however, does not apply to non-testimonial hearsay. See *Davis v. Washington*, __U.S.__, 126 S. Ct. 2266, 2274 (2006). While not explicitly defining the word "testimonial," the Court made clear in *Davis* that, generally, statements made for the purpose of litigation, such as grand-jury testimony, other prior testimony, affidavits, and formal memorialized statements of a witness taken by police all fell within any definition of that term. *Id.*

In *Williams v. Illinois*, __U.S.__, 132 S.Ct. 2221 (2012), the Supreme Court specifically considered and upheld the use of expert DNA comparison testimony that discloses the contents of reports by non-testifying witnesses. In that case, an Illinois State Police forensic analyst – who relied

³ The files were admitted as People's Exhibits 33, 34, and 35.

upon a DNA report prepared by a nontestifying third-party analyst – testified that the defendant’s DNA profile matched the male DNA profile derived from the sexual assault evidence kit by the third-party. A five-member majority, relying upon differing theories both on what constitutes hearsay and what types of statements are testimonial, held that the DNA comparison testimony was properly admitted.

Four members of the majority found that the expert’s reference to the DNA reports at issue did not constitute hearsay at all, because it only referenced a factual assumption for the expert’s conclusion. *Williams v. Illinois*, 132 S.Ct. at 2240. Four members of the majority also found that the DNA report was not testimonial because it did not have the primary purpose of establishing the guilt of a targeted individual. *Id.* at 2243. According to the plurality, every statement found to be testimonial by the Court has helped to prove the guilt of a known suspect. In *Williams*, however, the suspect had not been arrested at the time the laboratory conducted its testing, so there was no way that the technicians would have known what profile would have assisted the state.

The rationales behind the plurality’s holding, however, are limited by the concurring opinion written by Justice Thomas, who provided the fifth-

vote for the Court's majority. In his concurrence, Justice Thomas agreed that the admission of the expert testimony did not violate the confrontation clause. He reached "this conclusion, however, solely because [the laboratory's] statements lacked the requisite 'formality and solemnity' to be considered formal." *Id.* at 2255. Justice Thomas applied his formality test and concluded that the laboratory report was not a statement by a witness within the meaning of the confrontation clause. *Id.* at 2260. Justice Thomas based his opinion on the fact that the report did not attest that its statements accurately reflect the DNA testing process used or the results obtained. He noted that, even though the report was signed by supervisors, those supervisors did not purport to have conducted the tests or certified the accuracy of those who did. And, Justice Thomas found, "even though the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.*

Because Justice Thomas's vote in *Williams* was necessary for the majority and because it was decided on narrower grounds than stated in the main opinion, the decision has precedential effect only under the rationale stated in Justice Thomas's concurrence. As the Supreme Court explained in *Marks v. United States*, 430 U.S. 188 (1977), "When a fragmented Court

decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds... .'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 [1976]). Thus, the holding of *Williams* extends only so far as the grounds stated in that opinion.

Here, applying the holding of Justice Thomas, the DNA reports at issue and Ms. Yanoff's testimony about them were admissible.⁴ In this case, the certification on People's Exhibits 33, 34, and 35 merely attested to the fact that file was a business record, and that the copy of the records provided to the parties was a true and correct copy of the original records. Nowhere in the

⁴ To the extent that defendant claims otherwise, his claim is unpreserved for this Court's review by his failure to raise it in the trial court below. It is well established that to be preserved for appellate review a matter must be asserted at trial, (*People v. Lawrence*, 85 N.Y.2d 1002, 1004 [1995]; *People v. Norman*, 85 N.Y.2d 609, 624 [1995]; *People v. Bynum*, 70 N.Y.2d 858, 859 [1987]), and advanced there with specificity. *People v. Gray*, 86 N.Y.2d 10 (1995); *People v. Udzinski*, 146 A.D.2d 245, 250 (2d Dept. 1990). A claim that the court improperly admitted evidence at trial is subject to the rules of preservation. *People v. White*, 2012 N.Y. App. Div. LEXIS 3632 (2d Dept. 2012)(defendant failed to preserve contention that he was deprived of a fair trial by prosecutor's eliciting prior consistent statements that bolstered identification of defendant); *People v. Dasque*, 44 A.D.3d 681 (2d Dept. 2007)(*Crawford* claim unpreserved). At trial, although defendant objected to the entry of the OCME files into evidence, he did so based solely on the fact that Ms. Yanoff was not the person who had actually conducted all of the testing and prepared all of the documents, and that defendant had the right to cross-examine the person who did the testing. At no time did defendant claim that the reports were testimonial because of the level of formality contained in their certifications. Nor could he, because, as discussed fully above, these reports were not formalized reports and, thus, they did not constitute testimonial statements.

records is there any certification as to the accuracy of the results contained in the records. Exhibits 33, 34, and 35 contain mostly of charts, graphs, and numerical data, and the signatures that appear within the records are not affirming the accuracy of the results. As such, the records at issue in this case are no more formal than those in *Williams*, and so they were properly admitted in this case.

In addition, the files in this case were not testimonial because they did not have the primary purpose of establishing the guilt of a targeted individual. *See Williams v. Illinois*, 132 S.Ct. at 2243-44, *People v. Brown*, 13 N.Y.3d 332, 340 (2009). The DNA reports in this case were created before defendant was a suspect. And they were created by the laboratory at OCME, which is not a law-enforcement entity. Moreover, no technician at the OCME's office could have known if the profile they created would actually incriminate anyone; in fact, it is possible that the results of the OCME tests would have exonerated someone. Thus, the OCME reports were not testimonial for these reasons as well.

Defendant concedes, that under current Court of Appeals precedent, and this Court's precedent, trial court correctly allowed Ms. Yanoff to testify about the information contained in OCME's files (Defendant's Brief

at 37); *People v. Brown*, 13 N.Y.3d at 338. In this case, Ms. Yanoff performed the DNA comparisons herself, and defendant extensively cross-examined her about the testing and comparison process. Nevertheless, he claims that this Court should reconsider whether Ms. Yanoff's testimony was admissible because the Supreme Court had granted certiorari in *Williams*. But, as discussed above, after defendant filed his brief the Supreme Court decided *Williams* and upheld the use of expert DNA comparison testimony that discloses the contents of reports by non-testifying witnesses. Accordingly, and contrary to defendant's claim, the DNA evidence in this case was properly admitted under *Williams v. Illinois*. Thus, the admission of the files into evidence did not violate defendant's state or federal constitutional right to confront the witnesses against him.

In any event, any error in the admission of the evidence related to the DNA testing was harmless. *People v. Crimmins*, 36 N.Y.2d 230, 241 (1975). In this case, the parties stipulated that on October 10, 2007, defendant's DNA profile was found in the New York State database, and that defendant's DNA profile matched the DNA profiles created from the genetic material on the T-shirt recovered from Detective Whitaker's house, the gloves recovered from Ms. Gonzalez's apartment, and the iced tea container recovered from Ms.

Brown's house (Stipulation: 894-95). Therefore, even if the court's ruling admitting OCME's records into evidence and permitting Ms. Yanoff to testify about DNA testing was improper, it did not affect the outcome of the trial since there is no significant probability that the jury's verdict would have been different in light of the strong proof of defendant's guilt. *People v. Crimmins*, 36 N.Y.2d 230, 240 (1975).

Because the trial court's ruling was directly in line with Supreme Court and Court of Appeals precedent, this Court should find that the admission of the DNA evidence was proper. In any event, because defendant stipulated that his DNA profile matched the DNA profile created from the evidence recovered in this case, any error in the admission of evidence that DNA testing revealed that defendant's DNA profile matched the DNA profiles created from the evidence recovered from the crime scene was harmless. As such, defendant's conviction should be affirmed.

CONCLUSION

For the reasons set forth above, defendant's judgment of conviction should be affirmed.

Respectfully submitted,

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District Attorney
Queens County

JOHN M. CASTELLANO
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August 13, 2012

CERTIFICATE OF COMPLIANCE

I certify the following in compliance with section 670.10.3 of the Rules of this Court:

1. The foregoing brief was prepared on a computer.
2. The typeface used is Times New Roman.
3. The point size of the text is 14 point.
4. The brief is double spaced, except for the Table of Contents, point headings, footnotes, and block quotes.
5. The brief contains 13,546 words, exclusive of the Table of Contents, proof of service, and the certificate of compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Kew Gardens, New York
August 13, 2012

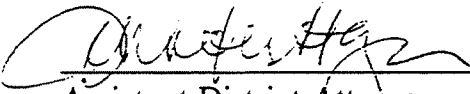

Assistant District Attorney

EXHIBIT D

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COPY

To be argued by
JONATHAN M. KRATTER
(10 Minutes)

New York Supreme Court

APPELLATE DIVISION -- SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

**TO BE HEARD ON
THE ORIGINAL
RECORD**

Queens County
Ind. No. 145/08
A.D. No. 11-00939

KENNETH WASHINGTON,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

KENNETH WASHINGTON, :

Defendant-Appellant. :

-----x

PRELIMINARY STATEMENT

This reply brief addresses arguments made in respondent's brief, mailed to appellate counsel on or about August 13, 2012. By order dated August 24, 2012, the Court granted appellant's application to enlarge the time for filing a reply brief to September 7, 2011. As to respondent's arguments not addressed herein, appellant relies on his main brief.

ARGUMENT

THE COURT VIOLATED APPELLANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY PERMITTING THE ADMISSION OF EVIDENCE OF DNA TESTING AND THE DEVELOPMENT OF DNA PROFILES THROUGH A WITNESS WHO DID NOT HAVE FIRSTHAND KNOWLEDGE OF ALL ESSENTIAL PARTS OF THE TESTING. SEE CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004); U.S. CONST., AMENDS. VI, XIV; N.Y. CONST., ART. 1, §6.

In Point III of our main brief we argued that the testimony of the People's expert witness regarding DNA testing done on evidence found at the crime scenes and on appellant's cheek swab was received in violation of appellant's federal and state Confrontation Clause rights as defined in Crawford v. Washington, 541 U.S. 36 (2004), because the witness had not performed all of the tests on which the DNA profiles were based. We noted that a case with a very similar issue was pending before the Supreme Court. In that case, Williams v. Illinois, __ U.S. __, 132 S.Ct. 2221 (2012), decided before respondent filed its brief, the court held that admission of DNA reports on samples taken from crime scene evidence did not violate the Confrontation Clause. However, taken together, the plurality opinion, Justice Thomas's concurrence, and Justice Kagan's opinion for the four dissenters, in the context of prior Supreme Court decisions and New York Court of Appeals case law, demonstrate that admission of such evidence in this case violated appellant's Confrontation Clause rights under the federal and state Constitutions.

In Crawford v. Washington, 541 U.S. at 59, 68, the Supreme Court held that "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," but left "for another day any effort to spell out a comprehensive definition of 'testimonial'." In Davis v. Washington, 547 U.S. 813 (2006), where the court found one unsworn statement to the police testimonial and another not, the court explained that statements

are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

Prior to its recent decision in Williams v. Illinois, the Supreme Court twice held that forensic testing reports were testimonial. In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-308, 329 (2009) (reports of tests for the presence and weight of a controlled substance), the court, quoting Crawford, 541 U.S. 51-52, stated that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" were testimonial. 557 U.S. 310. Similarly, in Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, 2717 (2011), the court found a blood alcohol concentration test report to be testimonial, noting

that it was based on evidence provided to the lab by the police and created "solely for an 'evidentiary purpose'" (citing Melendez-Diaz).

Notably, in Melendez-Diaz, the court explained the importance of the cross-examination requirement as applied to forensic reports, stating that "forensic scientists"

sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. . . . [They] may feel pressure - or have an incentive - to alter the evidence in a manner favorable to the prosecution. 557 U.S. at 318.

. . . .

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. Id. at 318-319.

Similarly, the first paragraph of the dissent in Williams v. Illinois, 132 S.Ct. at 2264, dramatically recounted a case where a DNA analyst realized after cross-examination that she had confused two samples and that the crime scene evidence contained the victim's DNA, rather than that of the defendant.

A. Evidence of the Cheek Swab DNA Testing by Persons Not Called to Testify Violated the Confrontation Clause.

One of the Confrontation Clause violations here is different from that in Williams v. Illinois, 132 S.Ct. 2221, where the plurality held that a DNA report performed on crime scene evidence was not testimonial. Id. at 2229-2230. Here, in addition to crime

scene DNA reports, the prosecution admitted a DNA report based on appellant's cheek swab taken after his arrest for these crimes. But in contrast to Williams v. Illinois, where the forensic analyst who developed a DNA profile from the defendant's blood testified at trial, 132 S.Ct. 2229, 2267, and no Confrontation Clause issue could be raised, the prosecution in appellant's case never called the analysts who worked on appellant's cheek swab. The evidence of the DNA data derived from appellant's cheek swab by the non-testifying analysts was inadmissible under the reasoning of both the plurality and dissenting opinions, each stating the position of four justices.¹

Critical to the Williams plurality was the difference it highlighted between the facts of Williams and those in Melendez-Diaz and Bullcoming, where the forensic reports were testimonial because they were "made for the purpose of proving the guilt of a particular criminal defendant at trial." 132 S.Ct. at 2243. In contrast, the "primary purpose" of the report in Williams was "to catch a dangerous rapist" at a time when Williams "had not yet been identified as a suspect." 2243-2244. The Williams dissent took a broader view of testimoniality, stating that consistent with

¹Similarly, while in our Main Brief we conceded that case law in the New York Court of Appeals and this Court had held that DNA evidence was not covered by the Confrontation Clause (37), those cases concerned DNA profiles from crime scene evidence, not a DNA sample taken from a targeted suspect after his arrest. People v. Brown, 13 N.Y.3d 332, 340 (2009); People v. Meekins, 10 N.Y.3d 136, 144-146 (2008).

Melendez-Diaz and Bullcoming, a forensic report is testimonial if it "was made to establish . . . some fact in a criminal proceeding," Id. at 2266, and concluding that the DNA report at issue was testimonial.

Under the analyses of both the plurality and the defense, the cheek swab report in this case was testimonial, because the testing was done after appellant was arrested for this crime and in order to prove his guilt.² Thus, the four plurality justices and the four dissenters would all find that the DNA report based on appellant's cheek swab was testimonial. Further, but for his view of the formality aspect of testimoniality that was not shared by any of the other justices, concurring Justice Thomas agreed with the dissent and would have reached the same result (see pp. ___, post). In short, since appellant was targeted when the cheek swab was taken and tested, the resulting DNA reports prepared by persons not called to testify were clearly testimonial under Williams and admitted in violation of appellant's Confrontation Clause rights.

²The plurality also concluded that the report was not testimonial because it was not received in evidence for its truth. Indeed, it was "not introduced into evidence" at all, 132 S.Ct at 2240, but was referred to by the DNA expert who testified as a basis for her conclusions, and in the bench trial held in that case, the judge would have known not to consider the report for its truth. 132 S.Ct at 2236. The plurality admitted that "The dissent's argument would have force if petitioner had elected to have a jury trial." In contrast, in this case, the report was admitted for its truth before a jury. Thus, the plurality's second reason for concluding that the report was not testimonial is totally inapplicable here.

B. Evidence of the Crime Scene DNA Testing by Persons Not Called to Testify Violated the Confrontation Clause.

Also essential to the prosecution's case, and produced by testing by non-testifying witnesses, were the DNA profiles from items taken from the three crime scenes. Save for the formality requirement placed on the definition of testimonial by Justice Thomas, five of the Supreme Court justices concluded that the similar evidence in Williams v. Illinois was inadmissible in the absence of an opportunity for cross-examination. But as Justice Thomas's formality analysis was clearly rejected by the other eight members of the court and is not correctly considered a "narrower ground[]" than that stated in the plurality (see Respondent's Brief at 57-58), but merely a different ground, the formality issue should not be considered controlling under either federal or state constitutional principles.

The four dissenters in Williams agreed that consistent with Melendez-Diaz and Bullcoming, the crime scene DNA reports were testimonial since the reports were admitted for their truth and "meant to serve as evidence in a criminal trial." 132 S.Ct at 2266-2272, 2275. The dissenters explicitly disagreed with the plurality's view that the evidence was not testimonial unless it focused on a targeted individual. Id. at 2273-2274. Concurring Justice Thomas, although offering his own analyses of these issues, "share[d] the dissent's view of the plurality's flawed analysis."

Id. at 2255. Thus, as dissenting Justice Kagan wrote: "Five Justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication." Id. at 226.

Justice Thomas nonetheless concurred with the plurality, maintaining that the DNA reports "lacked the requisite 'formality and solemnity' to be considered 'testimonial,'" Id. at 2255, because the analysts did not certify the truth of their representations and, therefore, their reports were not "similar in solemnity to the Marian examination practices³ that, the Confrontation Clause was designed to prevent." Id. at 2260-2261. The dissent referred to this as Justice Thomas's "unique method of defining testimonial statements," Id. at 2275, and the plurality did not adopt Justice Thomas's position.

Justice Thomas has adhered to this view in a line of opinions, referring to the Marian examinations, that, like his opinion in Williams v. Illinois, were signed by no other justices. Melendez-Diaz v. Massachusetts, 557 U.S. at 329-330; Giles v. California, 554 U.S. 353, 377-378 (2008); Davis v. Washington, 547 U.S. at 834-842. Justice Thomas has maintained this strict position even though, in a pre-Crawford opinion in which Justice Scalia joined, he admitted that "There is virtually no evidence of what the

³This reference is to English practices begun in the 1550s during the reign of Queen Mary. Davis v. Washington, 547 U.S. 813, 835-836 (2006); http://en.wikipedia.org/wiki/Mary_I_of_England.

drafters of the Confrontation Clause intended it to mean." White v. Illinois, 502 U.S. 346, 359 (1992).

Moreover, Justices Thomas's position is inconsistent with the that of the eight justices in Davis v. Washington, 547 U.S. at 213, that a formal statement to the police about facts relevant to a criminal prosecution can be testimonial whether it was the product of an interrogation or not, id. at 822, fn1., and even if the declarant never "sign[ed] a deposition," id. at 826., but only made an oral statement to the officer. Justice Thomas's view of the formality requirement should, therefore, be rejected by this Court, because it has been rejected all of his colleagues. To ask the Court, as respondent does (pp. 56-59), to adopt the position of a justice whose views are different from those of all the other members of the Supreme Court is unreasonable.

Respondent argues that Justice Thomas's view should be adopted because the Supreme Court has held that in cases where the result is determined by plurality and concurring opinions, the holding of the court is that stated in the narrower opinion (pp. 57-58). This result was sound in Marks v. United States, 430 U.S. 188 (1977), cited by respondent, where the court interpreted a prior opinion in which the plurality held that a book was not obscene under a particular definition of that term, while the concurring justices believed that any suppression of obscenity violated the First Amendment. Similarly, in Gregg v. Georgia, 428 U.S. 153, 169 &

fn15 (1976), the other case cited by respondent, a plurality stated that the holding in a prior case was the narrower view, that the death penalty statutes at issue were unconstitutional, not the concurring view that capital punishment was always unconstitutional. In these cases, one opinion was clearly narrower than the other, in that the justices who believed in a rule on broad constitutional grounds would always agree with others who reached the same conclusions based on the particular facts at hand.

This rule has no applicability in the present appeal. Justice Thomas's view of the formality requirement was neither more nor less narrow than the opinions of the plurality and the dissent, it was simply a different view, "unique" as Justice Kagan called it. 132 S.Ct. at 2275. Indeed, Justice Thomas might agree with either side in the division on the court, based on factors the other justices did not consider relevant. Compare Williams v. Illinois, 132 S.Ct. 2221 (Thomas joined plurality of Alito, Roberts, Kennedy and Breyer in finding statements were not testimonial), with Melendez-Diaz v. Massachusetts, 557 U.S. 305 (Thomas voted against the same four justices on a similar issue). Justice Thomas's position was rejected by all of the other justices in Williams, and in prior cases. While Justice Thomas reached the same result as the plurality, he disagreed with all of the plurality's reasoning, and the plurality accepted none of Justice Thomas's reasoning. Thus, his position was not narrower, and to conclude that that

opinion was the holding of the court, when the other eight justices disagreed with it, would be a dubious result to say the least.

In any event, the DNA testing records here satisfied Justice Thomas's formality requirement. As respondent admits, they were certified as business records (pp. 58-59), ensuring the accuracy of what was admitted in evidence. Furthermore, numerous pages of the records were initialed as performed and reviewed by persons not called to testify, so that particular people could be held accountable for their accuracy. This two-pronged certification and substantiation of the accuracy of the testing and the records meets Justice's Thomas's standards.

In addition, even without the certifications, the admission of these records and associated testimony violated appellant's right to confrontation under the New York State Constitution. As noted, except for Justice Thomas's extra formality factor, five members of the Supreme Court would have agreed in Williams that the DNA results generated by the private lab were testimonial. Williams v. Illinois, 132 S.Ct. at 226 (Kagan, J., dissenting). As far as it goes, this conclusion of a majority of the United States Supreme Court is binding on the New York courts, which must now follow it notwithstanding its incompatibility with Brown, 13 N.Y.3d 332, and People v. Meekins, 10 N.Y.3d 136. In People v. Goldstein, 6 N.Y.3d 119, 129 (2005), however, the New York Court of Appeals eschewed the requirement of formality and solemnity advocated by Justice

Thomas, as, of course, have the eight other Supreme Court justices. Notably, Goldstein also cited to the New York State Constitution, Article I, § 6, which contains New York's version of the Confrontation Clause. Id. at 127. Therefore, from a purely New York point of view, the combination of the common ground shared by the Thomas and Kagan opinions, the rejection of Justice Thomas's formality analysis by the other eight members of the court, and the relaxed attitude toward formality apparent in Goldstein, establish a right to confrontation under the New York State Constitution broader than the specific holding in Williams. Therefore,, under the New York State Constitution, the introduction of crime scene DNA evidence, as occurred here and in Williams, violates a defendant's right to confrontation.

In sum, in light of Williams v. Illinois, the admission of the DNA reports in this case violated the Confrontation Clause of the federal and state constitutions.

* * *

These errors cannot be considered harmless, since admission of the DNA profiles from appellant's cheek swab and the crime scene evidence was essential to the prosecution's case. The parties' stipulation that the crime scene DNA profiles matched appellant's profile in the New York State database did not constitute an admission that the profiles were properly developed from the evidence, but merely reflected the profile comparisons made by

Yanoff, who actually testified. However, Yanoff's conclusions were dependent upon the accuracy of the DNA profiles, all of which were developed through complex testing procedures. While Yanoff performed some of these tests personally, others were performed by persons not called to testify.⁴ Thus, respondent's contention that the stipulation rendered any Confrontation Clause violation harmless (RB60-61) should be rejected.

Furthermore, unlike for appellant's cheek swab, the prosecution presented no evidence that the DNA profile listed for appellant in the New York State database was developed from a sample taken from appellant or that the sample was properly tested. Thus, the only proven connection between the DNA from the crime scene and appellant was dependent on evidence of the testing of appellant's cheek swab.⁵ Without this evidence, the prosecution's case would have been insufficient.

⁴Respondent suggests that Yanoff "performed the DNA testing" on the evidence from the first crime in addition to interpreting the results of all the tests (p. 53). Respondent soon admits, however, as it must, that "a team of DNA analysts" worked on each case and that Yanoff "did not prepare every document that was contained in each case file" (p. 54). Thus, there can be no claim that the evidence of any of the test results was based on nonhearsay testimony.

⁵The database evidence was apparently admitted to explain why the police arrested appellant and obtained his cheek swab, not to establish the identity of the perpetrator. Defense counsel would have been grossly ineffective had he stipulated, in effect, that the DNA evidence proved that appellant was the perpetrator, in a case where the identity of the perpetrator was the central issue and the DNA evidence was the only proof.

These issues were preserved for review by defense counsel's objection that receipt of the DNA evidence violated the federal and state Constitutions. These objections encompassed the cheek swab evidence as well as the DNA evidence from the crime scene (Detective Curran: 425-427; Yanoff: 912-914, 949-954).

Respondent's claim that our argument that the DNA reports meet Justice Thomas's formality requirement is unpreserved (p. 58, fn. 4) is mistaken. Defense counsel's objection to the reports was not limited to one particular aspect of Confrontation Clause analysis, but encompassed all aspects of the clause. Since testimoniality is a central Confrontation Clause concept under Crawford and all the arguments made herein concern factors relevant to testimoniality, they are all preserved under defense counsel's Crawford objections. Indeed, even concepts much less closely related would be preserved by counsel's objection. See People v. Chestnut, 19 N.Y.3d 606, fn. 2 (2012) (defense counsel's objections to joinder of counts as prejudicial preserved issue of whether the joinder was legal because "the preservation rule's "'specific objection'" requirement should not be applied in [an] overly technical way"); People v. De Bour, 40 N.Y.2d 210, 215 (1976) ("The mere emphasis of one prong of attack over another or a shift in theory on appeal, will not constitute a failure to preserve"). Nor can counsel be faulted because he did not specifically reference Justice Thomas's opinion in Williams v. Illinois, as that case had not yet been decided.

In short, the DNA profile reports were admitted in evidence in violation of appellant's rights under the state and federal Confrontation Clauses. Therefore, appellant's conviction should be reversed and a new trial ordered.

CONCLUSION

FOR THE REASONS STATED ABOVE AND IN APPELLANT'S MAIN BRIEF, APPELLANT'S CONVICTIONS SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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Attorney for Defendant-Appellant

Jonathan M. Kratter
Of Counsel
September 2012

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR §670.10(f)

The foregoing brief was prepared on a computer. A monospaced typeface was used, as follows:

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EXHIBIT E

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Hon. Eugene Pigott
Court of Appeals Hall
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Albany, NY 12207-1095

Re: Criminal Leave Application
People v. Kenneth Washington

Dear Judge Pigott:

I am writing in support of my leave application in the above-captioned case. This case presents three DNA-related evidentiary issues of broad importance. The first two concern the impact on this Court's case law, including People v. Brown, 13 N.Y.3d 332 (2009), and People v. Rawlins (Meekins), 10 N.Y.3d 136 (2008), of the Supreme Court's recent application of the Confrontation Clause principles of Crawford v. Washington, 541 U.S. 36, 59, 68 (2004), to evidence of DNA testing in Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221 (2012). It appears likely that this Court will consider these issues soon, and they are clearly preserved for review under both the state and federal constitutions in this case. The third, two-part, issue is based on: (1) the court's refusal to permit defense counsel to contest the statistical conclusions drawn from "cold hit" DNA profile matches by cross-examining the prosecution expert about DNA profile comparisons from other states that suggested that DNA matches were not nearly as rare as she had claimed; and (2) the court's rejection of counsel's contention that the expert's minimal statistical background failed to qualify her as an expert for purposes of explaining the complex statistical significance of the DNA test results to the jury. As the use of "cold hit" DNA evidence has become common, these issues are also of statewide importance.

These issues are critical in cases such as this one where the only evidence of identification was matching DNA profiles. The Supreme Court has emphasized that "DNA testing can provide

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powerful new evidence unlike anything known before” that is very “persuasive[] . . . in the eyes of the jury.” McDaniel v. Brown, 558 U.S. 120, 136 (2010) (citation omitted). Yet examples of errors in the development of DNA profiles have surfaced. Williams v. Illinois, ___ U.S. ___, 132 S.Ct. at 2264 (Kagan, J. dissenting) (recounting instance where, on cross-examination, DNA analyst admitted her report was mistaken and crime scene DNA matched that of victim, not defendant); Osagie K. Obasogie, “High-Tech, High-Risk Forensics,” *The New York Times*, July 24, 2013 (citing two examples of DNA evidence errors). Thus, to defend against such evidence, a defendant must be given a full opportunity to cross-examine those who produce the DNA test results. Similarly, substantial questions have been raised about the interpretation of the statistics on which “cold hit” convictions have been based. Particularly when, as here, DNA evidence is the sole means of identifying the perpetrator, it is critical that defendants be provided with the opportunity to challenge its reliability.

Appellant was initially identified as a suspect in three separate home invasions by “cold hit” DNA evidence consisting of matches between DNA profiles from the crime scenes and a profile in the New York State database. However, no connection between the database profile and appellant was proved at trial. Instead the identification was based on matches between a DNA profile from appellant’s cheek swab and those from the crime scenes.

A. Application of *Crawford* and *Williams* to Post-Arrest Cheek Swabs

In Crawford, the Supreme Court held that “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine,” but left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’” In Davis v. Washington, 547 U.S. 813 (2006), where the court found one unsworn statement to the police testimonial and another not, the court explained that statements

are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

Prior to Williams v. Illinois, the Supreme Court twice held that forensic testing reports were testimonial. Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, 2717 (2011) (blood alcohol concentration test report following DWI arrest was created “solely for an ‘evidentiary purpose’”); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-308, 310, 329 (2009) (same result for reports of tests for the presence and weight of a controlled substance connected to the defendant).

The Williams plurality contrasted those cases with a situation where the "primary purpose" of the DNA report was "to catch a dangerous rapist" who "had not yet been identified." 132 S.Ct. at 2243-2244. The four Williams dissenters took a broader view of testimoniality. They stated that, consistent with Melendez-Diaz and Bullcoming, a forensic report is testimonial if it "was made to establish . . . some fact in a criminal proceeding." Id. at 2266, and concluded that the DNA report was testimonial.

Under the analyses of both the plurality and the dissent, the cheek swab report in this case was testimonial, because the testing was done after appellant was arrested based on the "cold hit" DNA match between the crime scene evidence and the DNA database. The only purpose for the cheek swab was to produce evidence admissible at trial in order to prove the guilt of appellant, an identified and arrested suspect.¹ Thus, the four plurality justices and the four dissenters in Williams would all find that the DNA report based on appellant's cheek swab was testimonial. Further, but for his view of the formality aspect of testimoniality that was not shared by any of the other justices, concurring Justice Thomas agreed with the dissent and would have reached the same result (see Section B post). In short, since appellant was targeted before the cheek swab was taken and tested, the resulting DNA reports prepared by persons not called to testify were clearly testimonial under Williams and admitted in violation of appellant's Confrontation Clause rights.

B. Application of Crawford to the Crime Scene DNA

Williams should also prompt reconsideration of the Court's conclusions in People v. Brown, 13 N.Y.3d 332, and People v. Rawlins (Meekins), 10 N.Y.3d 136, that reports on DNA evidence found at a crime scene or in a rape kit prior to any identification of the suspect are not testimonial, so that the Confrontation Clause does not apply. While Williams superficially reached the same result as Brown and Meekins, five justices (the four dissenters and concurring Justice Thomas) actually found the opposite. The four Williams dissenters concluded that consistent with Melendez-Diaz and Bullcoming, the crime scene DNA reports were testimonial since they were admitted for their truth and "meant to serve as evidence in a criminal trial," and they explicitly disagreed with the plurality's view that the evidence was not testimonial unless it focused on a targeted individual. 132 S.Ct. at 2266-2275. In addition, concurring Justice Thomas "share[d] the dissent's view of the plurality's flawed analysis." Id. at 2255.² Thus, as dissenting Justice Kagan wrote: "Five Justices

The plurality also concluded that the report was not testimonial because it was "not introduced into evidence" and not used for its truth, but was referred to by the DNA expert as a basis for her conclusions, and in that bench trial, the judge would have known not to consider the report for its truth. 132 S.Ct. at 2236, 2240. The plurality admitted that "The dissent's argument would have force if petitioner had elected to have a jury trial." In contrast, in this case, the report was admitted for its truth before a jury.

Justice Thomas concluded that the DNA reports were not testimonial because they "lacked the requisite formality and solemnity." 132 S.Ct. at 2255. However, his view of the formality

specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication." Id. at 226. Therefore, it appears that five Supreme Court justices would disagree with the substantive conclusions reached in Rawlins(Meekins) and Brown, and this Court should reexamine those conclusions under both the state and federal constitutions.

C. Appellant's Attempts to Challenge the Prosecution's Statistical Conclusions Based on the DNA Results

Former Chief Judge Kaye has warned that

evidence of a [DNA] "match" is virtually meaningless without resort to the statistical interpretation: population genetics is arguably the most crucial step of the analysis. It is the area of greatest controversy among the experts.

People v. Wesley, 83 N.Y.2d 417, 444 (1994) (concurring opinion). The Supreme Court has referred to the interpretation of statistics in the same manner as was done in this case as "the prosecutor's fallacy." McDaniel v. Brown, 558 U.S. at 128, and the above-cited Obasogie article asserts that, according to analyses employed by committees of the FBI and the National Research Council, a "one-in-1.1 million" chance of DNA match being coincidental could, in the context of a particular case, actually be "one in three." Additional cases and journal articles questioning the use of statistics in cold hit DNA cases in the manner in which they were used here are cited at pages 30-31 of our Main Brief in the Appellate Division.

Moreover, "[s]tudies show that DNA is particularly persuasive to juries," possessing "a special aura of certainty and mystical infallibility" and being "so persuasive that its mere introduction in a criminal case is sufficient to seriously impede defense challenges." Sarah M. Ruby, "Checking the Math: Government Secrecy and DNA Databases," 6 ISJLP³ 257, 258 (2010). Thus, in the interests of fairness and due process, and in furtherance of their rights to confront witnesses and present a defense, it is essential that defendants be given a full opportunity to challenge the statistical interpretation of the DNA evidence used against them. U.S. Const., Amends. V, XIV; N.Y. Const., Art. I, §6: Davis v. Alaska, 415 U.S. 308, 316 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973).

In this case, the trial court improperly limited appellant's ability to challenge the DNA statistics in two respects. First, the court improperly prevented defense counsel from cross-

requirement, referred to by the dissent as his "unique method of defining testimonial statements," Id. at 2275, is not shared by any of the other Supreme Court Justices or by this Court (Reply Brief in the Appellate Division, pp. 8-9, 11-12).

³This abbreviation refers to "US: A Journal of Law and Policy for the Information Society."

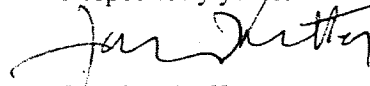
examining the DNA expert about the numerous identical DNA profiles discovered in the DNA databases in Arizona, Illinois, and Maryland when the profiles in each database were checked against the others in the same database. See Jason Felch and Maura Dolan, "FBI Resists Scrutiny of Matches," Los Angeles Times, July 20, 2008, p. A1 (hereinafter "LA Times"). In Arizona, in a database of 65,000, there were 122 matches, and at 10 DNA loci, which the prosecution's expert testified should result in a matching probability of one in more than one trillion, there were 20 matches. Similarly, Illinois comparisons produced 903 matches at nine or more loci in a database of about 220,000, Id., while Maryland produced 33 matches in a database of about 20,000, 11 of them at 10 or more loci. United States v. Davis, 602 F.Supp.2d 658, 681 (D.Md. 2009); LA Times. See also "Prince George's County Case: Raising Doubt on DNA," The Baltimore Daily Record, July 25, 2008. A much larger database, as in the New York metropolitan area, would presumably produce many more matches. Thus, the results in these states and related concerns expressed in case law and the scientific community, see e.g., pp. 30-31 of our Main Brief in the Appellate Division, have raised substantial questions about how DNA profile matches should be interpreted when they are the only evidence against a defendant. Therefore, exploration of these inconsistent results was essential to defense counsel's ability to defend against the DNA evidence.

Also, defense counsel argued that the prosecution's DNA expert, while qualified to testify about developing and comparing DNA profiles, was not qualified to testify as an expert in the statistical significance of DNA profiles, as she had taken only one college course in statistics and another of unspecified length at the Medical Examiner's office. A party offering expert testimony has the burden of establishing that the expert possesses "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." Mattot v. Ward, 48 N.Y.2d 455, 459 (1979). A trial court's ruling on an expert's qualifications can be reversed when "serious mistake, an error of law or abuse of discretion" is demonstrated. Werner v. Sun Oil Co., 65 N.Y.2d 839 (1985). Here, the statistical issues were crucial and complex. The expert, admittedly only "pretty sure" of some of her statistical claims, was not equipped to explain to the jury the relationship between the likelihood of a particular DNA profile appearing and the likelihood that someone other than appellant could have had the same profile. Therefore, the court erred in accepting her as an expert in the statistical significance of DNA profiles.

* * *

I am enclosing with this letter pages 896-901, 909-914, 951-954, and 965-966 of the trial transcript which show that defense counsel preserved the issues addressed in this letter for appellate review. I would be pleased to provide any additional information you might want or to participate in a leave conference.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Jon Kratter", written over the typed name.

Jonathan M Kratter
(212) 693-0085, ext. 245

cc: Jennifer Hagan, Assistant District Attorney, Queens County



DISTRICT ATTORNEY
QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568
(718) 226-6000

Richard A. Brown
District Attorney

The Honorable Eugene F. Pigott, Jr.
Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

January 12, 2014

Re: *People v. Kenneth Washington*
Queens County Indictment Number: 145/08

Your Honor,

I submit this letter in reply to defendant's letter application for leave to this Court from the May 24, 2013, order of the Appellate Division, Second Department, in the above-referenced case. *People v. Washington*, 108 A.D.3d 576 (2d Dept 2012).

In this case, defendant broke into the homes of three separate women. During the first home invasion, defendant broke into the home of an off-duty police officer, smashed the butt of the victim's gun into her head and face, and stomped on her face. Defendant stole her property, including her gun, and fled the scene. The victim's injuries required staples and stitches, and she was not able to return to work for four months. In the second incident, defendant broke into a home while nobody was home and stole property. In the third incident, defendant broke into a six-month pregnant woman's home, sexually assaulted her, and choked her two separate times until she defecated on herself. The victim jumped out of her window and ran to a neighbor's house to seek help. Defendant's DNA was left at each crime scene. Approximately three months after the last incident, defendant's DNA profile

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was found in the New York State database.¹

In his follow up leave letter, defendant asks this Court to review three claims that had been raised in his main Appellate Division brief, and one claim that had been raised in his reply brief, all of which relate to the DNA evidence that had been admitted in this case. Specifically, defendant asks this Court 1) to review whether a DNA profile taken from a cheek-swab of a defendant is a testimonial statement; 2) to overrule its holdings in *Rawlings* and *Brown* and find that DNA reports pertaining to evidence found at a crime scene are testimonial statements; 3) to determine whether the People's DNA expert was properly permitted to give expert testimony on the statistical significance of DNA; and 4) to determine whether the lower court improperly limited defendant's cross-examination of the People's DNA expert. As discussed fully below, none of these issues warrant review by this Court.

First, defendant asks this Court to review a claim that defendant had raised for the first time in his reply brief in the Appellate Division, namely, that the DNA profile of the cheek swab that had been taken from defendant after his arrest is testimonial and should not have been admitted at trial. Defendant specifically bases this claim on the premise that that DNA profile was taken from defendant after he was arrested, for the primary purpose of admitting those test results at trial to establish defendant's guilt, rather than for the primary purpose of catching a dangerous predator who had not yet been identified. This claim, however, is not preserved for appellate review and is, therefore, not reviewable by this Court.

In this regard, at trial, the People asked their expert witness if she had compared the male DNA profile that had been generated from the swab of defendant's cheek with the DNA profile that had been recovered from a glove that had been left behind at the second crime scene. Counsel objected to the admission of this testimony by stating, "note my objection as indicated earlier" (Yanoff: 954). Earlier, counsel had objected to the admission of the DNA profiles that had been collected at each of the three crime scenes on the ground that some of the paperwork related to the DNA profiles that had been created were prepared by people other than the testifying witness. But counsel did not, at that time, make an argument that, because those DNA profiles had been generated after defendant had been arrested, their primary purpose was not to catch a dangerous predator but to be used against defendant at trial (Yanoff: 912-914). Nor could defendant have made this argument, because the DNA recovered from each crime scene had been tested before defendant was ever arrested in connection with this case. Counsel only relied on his earlier, general objection to the admission of DNA evidence but at the time of the admission of the post-arrest DNA profile counsel never explained to the court below that he believed that the

¹ Defendant's DNA profile was uploaded to the DNA database after he was convicted of a separate home invasion, during which he robbed an elderly man and beat him with his cane.

profile from the swab taken after defendant's arrest was a testimonial statement because it had been created with the primary purpose of incriminating defendant after his arrest. Thus, this Court cannot consider this new argument, that was never raised by defendant in the trial court. See *People v. Darryl H.*, 21 N.Y.3d 708, 715 (2013).

Nor should this Court review defendant's claim that his right to confront witnesses was violated by the admission of the results of DNA profiles created from samples taken from each crime scene into evidence. As defendant conceded in his Appellate Division brief, this Court has held that DNA reports like the ones introduced in this case do not constitute the kind of testimonial evidence that violates the Confrontation Clause. *People v. Rawlins*, 10 N.Y.3d 136, 158-60 (2008). In this case, the person who compared the results of the various DNA tests did testify at trial. Therefore, defendant's claim – that his confrontation rights were violated because the People did not call every employee of the Office of the Chief Medical Examiner who was involved in the DNA test process – is outside of the scope of the Confrontation Clause. As this Court held in *Rawlins*, any errors that may occur in this type of DNA testing procedure “are not the product of ‘testimony’ as [this Court] understand[s] that term.” *Id.* at 159.

Moreover, In *Williams v. Illinois*, __U.S.__, 132 S.Ct. 2221 (2012), the Supreme Court specifically considered and upheld the use of expert DNA comparison testimony that discloses the contents of reports by non-testifying witnesses. In that case, an Illinois State Police forensic analyst – who relied upon a DNA report prepared by a nontestifying third-party analyst – testified that the defendant's DNA profile matched the male DNA profile derived from the sexual assault evidence kit by the third-party. A five-member majority, relying upon differing theories, held that the DNA comparison testimony was properly admitted. The Court's reliance on different theories, however, does not change the fact that both the United States Supreme Court and this Court have held that DNA reports like the DNA profiles taken from the crime scene in this case are not testimonial statements. Significantly, even after the Supreme Court's decision in *Williams*, this Court has continued to adhere to the analytical framework that it used in *Rawlins* and *Brown*. See *People v. Pealer*, 20 N.Y.3d 447, 455 (2013). Thus, the law on this topic is well-settled and does not warrant further review.

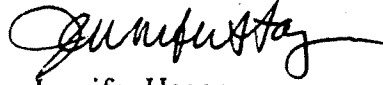
Defendant also asks this Court to review defendant's claim that the trial court improvidently exercised its discretion when it qualified the People's DNA expert to render an opinion about the statistical significance of DNA. But the qualification of a witness as an expert is left to the discretion of the trial court, and is subject to review only if the court has made a serious mistake, committed an error of law, or abused its discretion. *Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410, 414 (1971). As the Appellate Division correctly held, and as fully discussed in the Respondent's Appellate Division Brief at 36-42, the

People's expert "possessed the requisite skill, training, education, knowledge, or experience to render a reliable opinion in that field." Accordingly, this issue, too, does not warrant review by this Court.

Likewise, this Court cannot review defendant's claim that the trial court improperly precluded cross-examination of the People's expert witness about DNA profile comparisons from three other states. As the People argued below, defendant's challenge to the limitation of his cross-examination of the DNA expert's testimony is not preserved for this Court's review (Respondent's Brief at 42-46). Thus, defendant's claim is not reviewable by this Court.

In any event, this Court also should not review this claim because the lower court acted well-within its discretion when it limited defendant's cross-examination of the People's DNA expert. As discussed in the Respondent's Appellate Division Brief at pages 42-53, and as the Appellate Division correctly held, counsel's proposed questioning about DNA profiles from three other states had the potential to mislead and confuse the jury. In fact, in the court below, defendant did not refer at all to specific data produced by the Illinois and Maryland internal DNA database comparisons upon which he sought to examine Ms. Yanoff, who had already testified that the comparisons in this case matched at least twelve locations. The only specific information defendant provided to the court below was that he intended to cross-examine Ms. Yanoff about DNA matches in the Arizona database at "nine locations," but he did not explain to the court that the Arizona comparisons also contained information about matches at ten locations, and, according to defendant's appellate brief, the Illinois and Maryland comparisons produced matches at "nine or more loci" and "ten or more loci," respectively. Thus, the court below had no reason to believe that these studies were relevant. Moreover, defendant made no offer of proof in the court below that showed that the statistical methods he sought to explore were reliable, or that they were at all accepted in the scientific community. Thus, this Court should not review this claim. *See People v. Halter*, 19 N.Y.3d 1046, 1050 (2012) (proper to limit or preclude cross-examination when it is confusing or unfairly prejudicial). Accordingly, this claim, like defendant's other claims, does not warrant further review.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jennifer Hagan", with a stylized flourish at the end.

Jennifer Hagan
Assistant District Attorney
(718) 286-5902

cc: Appellate Advocates
2 Rector Street – 10th Floor
New York, New York 10006
Attn: Jonathan Kratter, Esq.

State of New York Court of Appeals

BEFORE: HON. EUGENE F. PIGOTT, JR.,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

KENNETH WASHINGTON,

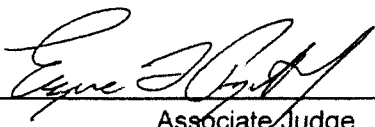
**ORDER
DENYING
LEAVE**

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case,*

UPON the papers filed and due deliberation, it is
ORDERED that the application is denied.

Dated: Buffalo, New York
this 3/5th day of January, 2014


Associate Judge

* **Description of Order:** Order of the Appellate Division, Second Judicial Department, entered July 3, 2013, affirming a judgment of Supreme Court, Queens County, rendered January 19, 2011.

A000326

A516

United States District Court Eastern District of New York

15-CV-0603
(Block, D.J.)

KENNETH WASHINGTON,

Petitioner,

against

THOMAS GRIFFIN
Superintendent,

Respondent.

AFFIDAVIT AND MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS

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JOHNNETTE TRAILL
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Assistant District Attorneys
Of Counsel

MAY 13, 2015

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
KENNETH WASHINGTON, :
 :
 : Petitioner, : AFFIDAVIT IN
 : : OPPOSITION TO
 : -against- : PETITION FOR
 : : WRIT OF HABEAS
 : : CORPUS
 :
 THOMAS GRIFFIN, Superintendent, :
 :
 : Respondent. : 15-cv-0603 (FB)
 :
-----X

STATE OF NEW YORK)
) ss.
COUNTY OF QUEENS)

WILLIAM H. BRANIGAN, an Assistant District Attorney in the
County of Queens and an attorney admitted to practice law in this Court, being
duly sworn, deposes and states as follows:

1. I am an Assistant District Attorney, of counsel to Richard
A. Brown, the District Attorney of Queens County, attorney for respondent in
this matter. I am submitting this affidavit in opposition to petitioner's
application for a writ of *habeas corpus* and in response to this Court's
February 10, 2015, Order to Show Cause directing respondent to file an answer
to the petition. I make the statements in this affidavit upon information and

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belief, based upon my review of the records and files of the Queens County District Attorney's Office.

2. Pursuant to this Court's order, respondent is supplying to the Court a) the transcript of the trial proceedings in New York State Supreme Court, Queens County; b) the briefs submitted to the Appellate Division, Second Department, consisting of petitioner's brief, the State's brief, and the decision affirming petitioner's conviction and sentence, *People v. Washington*, 108 A.D.3d 576 (2d Dept. 2013); c) petitioner's application for leave to appeal to the New York Court of Appeals, the State's response, and the decision denying petitioner's application, *People v. Washington*, 22 N.Y.3d 1091 (2014).

Factual and Legal Background

3. On August 17, 2006, at approximately 2:00 a.m., at [REDACTED] [REDACTED]th Street, off-duty detective *CASSANDRA WHITAKER* woke up and saw a man standing in her bedroom, searching through her jewelry box (Whitaker: 489). The man's face was covered with a black stocking cap with a knot on top of it, and his hands were covered in socks.

4. Detective Whitaker reached into her night stand drawer and tried quietly to remove her gun from its holster. While Detective Whitaker had

her hand on the gun, petitioner came over to her, grabbed her hand, and tried to wrestle the gun from her. Detective Whitaker kept at least one hand on the gun while petitioner had one hand on the gun and was beating Detective Whitaker with his other hand (Whitaker: 490-93). Detective Whitaker tasted salt and began to have trouble seeing because blood was pouring from her face and head (Whitaker: 493).

5. Ultimately, petitioner took the gun from Detective Whitaker. He hit her in the head with it repeatedly, and pushed her in the bathroom, and told her to get in the bathtub. Petitioner called Detective Whitaker a "stupid fat bitch" and "police bitch" (Whitaker: 494-95). He demanded money, asked where the safe was located, and told Detective Whitaker that he was going to kill her. Petitioner pushed Detective Whitaker into her bathtub. When he left the bathroom, Detective Whitaker tried to get up and escape, but she slipped on her blood, which was covering her bathtub. Petitioner returned and continued to hit her in the head with the gun. He pushed her down into the bathtub and stomped on her face with his feet (Whitaker: 496-98).

6. Petitioner took Detective Whitaker's purse, turned it upside down, emptied it, searched her wallet, left the bathroom, and closed the door.

She grabbed her cell phone, which had fallen into the bathtub when petitioner emptied her purse, and called 911 (Whitaker: 497-99).

7. Detective *PATRICK CURRAN*, who knew Detective Whitaker from work at the police department, responded to her house after he received a radio run for a burglary in progress, which was updated to a run for a police officer needing assistance (Curran: 382). Detective Curran rang Detective Whitaker's doorbell and she answered the door. She was distraught. She was covered in blood from her head to her waist, and blood was flowing from an open wound in her forehead that Detective Curran initially mistook for a gunshot wound. Her nightgown was covered in blood and her face looked like she was wearing a Halloween mask. Her hardwood floors, walls, and bathroom were all covered in her blood (Curran: 384).

8. Detective Whitaker told Detective Curran that she believed the intruder was still in her home, and she told him that the man had her gun. Detective Whitaker described the intruder as a black man, wearing a white T-shirt, three-quarter denim jean shorts, braids or cornrows, and a mask (Whitaker: 385).

9. After the sun came up, Detective Curran did a daylight search of the area surrounding Detective Whitaker's house to make sure

nothing was missed in the dark. He found a bloody white T-shirt, a bloody white sock, and a black stocking cap with a knot on top of it in front of the neighbors' homes (Curran: 398-419). Detective *DANIEL BOGGIANO* of the Crime Scene Unit took photographs of these items and gave them to Detective Curran, who vouchered them (Boggiano: 619-22, 635). Each of these items looked like the clothing worn by the intruder. Each item was later tested by *NATALYN YANOFF*, an expert in DNA analysis, forensic biology, and statistical studies, and a DNA profile report was created from cells removed from the neckline of the white T-shirt (Yanoff: 922-923).

10. Meanwhile, Doctor *SANDRA TORRES* treated Detective Whitaker at North Shore Hospital post-assault for lacerations and severe bruises (Torres: 576-82). The wounds on her face were stitched by a plastic surgeon and Dr. Torres stapled the wounds on her head shut. Detective Whitaker returned home a few days after she was hospitalized and she discovered that some of her property, including jewelry, her gun, and her badge, were missing from her house. She did not return to work for almost four months. Detective Whitaker did not know petitioner and had not given him permission to be in her house (Whitaker: 504, 511).

11. In the meantime, the police continued to investigate the case. Detective Curran took an elimination DNA swab from Detective Whitaker. Detective Whitaker viewed hundreds of photographs in an attempt to find suspects. Detective Curran visited pawn shops. None of these investigative efforts led to an arrest (Curran: 419-422).

12. On December 5, 2006, *LUISA GONZALEZ* went to work. She returned to her apartment, which was located at [REDACTED]st Street, and she noticed that somebody had broken into her apartment (Gonzalez: 677). She called the police and she and her son, *LUIS ALONZO*, pointed out two gloves that did not belong to anyone in their family (Alonzo: 886). Ms. Gonzalez and Mr. Alonzo noticed that some of their property, including jewelry, a new pair of sneakers, a video game system, and video games were missing from their apartment. Ms. Gonzalez and Mr. Alonzo did not know petitioner. Petitioner did not have permission to enter into their apartment (Gonzalez: 677-82; 689-93; Alonzo: 886-91).

13. Detective *SHAMICKA MEADOWS* dusted Ms. Gonzalez's apartment for fingerprints (Meadows: 656). She recovered the gloves from Ms. Gonzalez's apartment, and sent them to be tested (Meadows: 658). *MELVIN SHAW*, a criminalist with the New York City Police Department,

tested the gloves for trace evidence, in an attempt to collect hairs and fibers from the gloves (Shaw: 781). The Office of the Chief Medical Examiner later created a DNA profile report from cells removed from the gloves (Yanoff: 906).

14. On July 15, 2007, *STACY BROWN*, who was then six months pregnant, was sleeping in her house, which was located at [REDACTED] Road. Early that morning, she heard a thump, woke up, noticed that her sister's luggage had been moved, and returned to sleep (Brown: 699-708, 754-55).

15. At 1:00 p.m., Ms. Brown's telephone rang and she got up to answer it. Petitioner appeared in her bedroom. He was wearing her white robe, had socks on his hands, and had a white towel or T-shirt covering his face. She was wearing boy shorts, a bra, and a camisole shirt. Petitioner forced Ms. Brown down on to her bed, and he held her face against her pillow. Ms. Brown was not able to breathe. Petitioner fondled her buttocks and he touched his erect penis to the outside of her anus (Brown: 708-14, 735). Ms. Brown thought petitioner was going to rape her (Brown: 712). He asked her, "Where's the money, bitch?" (Brown: 715).

16. Petitioner punched and choked Ms. Brown while she held her stomach and tried to shield her unborn baby from the attack. The man also demanded money and jewelry. He tied a T-shirt around Ms. Brown's face. She was able to see down, under the shirt, but she was not able to see her attacker's face (Brown: 713-16, 766-67).

17. Petitioner dragged Ms. Brown into the kitchen, opened her refrigerator, gulped from a container, spit iced tea on Ms. Brown and on the floor, and dropped her iced tea container on the ground. He forced Ms. Brown into another bedroom. Petitioner told Ms. Brown that he was going to put her to sleep and he choked her until she was about to pass out. She defecated on herself, and petitioner called her a "nasty bitch" in an angry tone of voice (Brown: 716-18, 767-69, 772).

18. Petitioner dragged Ms. Brown to the bathroom, threw her in the shower, and told her to wash off. Ms. Brown tried to take the T-shirt off of her face, but petitioner punched her in the face and prevented her from doing so (Brown: 718-21).

19. Petitioner grabbed Ms. Brown out of the shower, dragged her back to a bedroom, and put her on the lower end of the bed. Petitioner told Ms. Brown that he wanted to "lick her pussy" (Brown: 721-22). He touched

his erect penis to the outside of her anus, and choked her until she could not breathe. Ms. Brown defecated again, and petitioner put her on the toilet and left the bathroom. Ms. Brown kicked the bathroom door shut and locked it. She opened a window that was in her bathtub, hoisted herself up, and dove, head first, out of the window. The window was eight feet above the ground. Ms. Brown landed on the ground, on her back (Brown: 718-730). She crawled to the front of her house, pulled herself up by grabbing her fence, and ran, covered in blood and feces, to the house of her neighbor, *SOPHIA MCINTOSH* (McIntosh: 807).

20. Ms. McIntosh opened her door, and saw Ms. Brown covered in blood and feces. Ms. Brown was screaming that someone had attacked her in her home. Petitioner had ripped off Ms. Brown's camisole top and, at this point, she was only wearing her bra and underwear. Ms. Brown fell into Ms. McIntosh's foyer, grabbed her stomach, and screamed at Ms. McIntosh to call 911. Ms. McIntosh called the police, and noticed a man in a white robe scaling the fence behind Ms. Brown's house (McIntosh: 806-10).

21. Ms. Brown was taken to the Jamaica Hospital trauma center and was treated by Doctor *LAWRENCE KRAMER*, the attending physician for Obstetrics and Gynecology (Kramer: 817-19). Ms. Brown had bruising and

abrasions and she was kept at the hospital for three days so that she and the unborn baby could be monitored (Kramer: 824). Ms. Brown never gave petitioner permission to be in her house (Brown: 751).

22. Detective *WILLIAM PORTER* recovered the iced tea container from Ms. Brown's apartment and dusted the house for fingerprints (Porter: 845-48). Police Officer *YUAN YE* vouchered the iced tea container (Ye: 796-801). It was sent to the laboratory for analysis, and a DNA profile report was created from saliva recovered from the iced tea container (Porter: 849).

23. *WILLIAM UMSTEAD*, an expert in the field of fingerprint analysis, examined the fingerprints that had been lifted in this case. The prints were either of no value or did not match Kenneth Washington's fingerprints (Umstead: 600-614).

24. On October 10, 2007, petitioner's DNA profile was found in the New York State database. Petitioner's DNA profile matched the DNA profiles created from the genetic material on the T-shirt recovered from Detective Whitaker's house, the gloves recovered from Ms. Gonzalez's apartment, and the iced tea container recovered from Ms. Brown's house

(Stipulation: 894-95).¹ On October 11, 2007, Detective *RICHARD SANTANGELO* arrested petitioner (Santangelo: 871-72). Detective Curran subsequently took a DNA swab from petitioner's cheek and sent it for DNA testing (Curran: 425-27).

25. Petitioner was charged with three counts of Burglary in the First Degree (New York Penal Law §§ 140.30[2] and [3]); three counts of Burglary in the Second Degree (New York Penal Law § 140.25[2]); two counts of Assault in the First Degree (New York Penal Law § 120.10 [4]); two counts of Assault in the Second Degree (New York Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (New York Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (New York Penal Law § 130.65[1])(Queens County Indictment Number 145/08).

26. Petitioner proceeded to trial before the Honorable Gregory Lasak of the New York State Supreme Court, and a jury. At trial, the State presented the testimony summarized above. In addition, Natalyn Yanoff, a Criminalist Level Three in the Department of Forensic Biology at the Office of the Chief Medical Examiner, and an expert in Forensic Biology, DNA

¹The parties also stipulated that petitioner was not an identical twin.

analysis, and the statistical significance of DNA profiles, testified about the science of DNA and DNA analysis, and the results of the laboratory tests that had been performed in this case (Yanoff: 896). Ms. Yanoff explained that, at the time the evidence in this case was tested, OCME used thirteen standardized areas of DNA, or "loci," for analysis (Yanoff: 902-06, 926-27, 962-63). The thirteen loci contained twenty-six alleles (Yanoff: 958).

27. Ms. Yanoff explained that her colleagues created a DNA profile for petitioner and Ms. Whitaker. Ms. Yanoff also examined cells that were scraped from the neckline of the T-shirt that had been recovered from Ms. Whitaker's apartment. Her colleagues examined cells that had been scraped from the gloves recovered from Ms. Gonzalez's apartment, and the saliva that had been recovered from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 906-11).

28. Ms. Yanoff determined that a mixture of DNA was found on the T-shirt. Ms. Whitaker's DNA was present in the sample, and male DNA was also present in the sample. Ms. Yanoff was able to create a male DNA profile from the T-shirt. One locus tested inconclusive, and results at three loci were available for only one allele, which provided full results for nine loci, and partial results at one allele at three locus points (Yanoff: 922-25, 930).

29. A mixture of DNA was found on the gloves recovered from Ms. Gonzalez's apartment, and a male DNA profile was created for the major donor (Yanoff: 940-45). A male DNA profile was also created from the swab that was taken from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 932-35).

30. Ms. Yanoff testified that the male DNA profile that had been generated from the T-shirt, the gloves, and the iced tea container was found in one in more than one trillion people. She concluded with a reasonable degree of scientific certainty that the DNA profiles from the T-shirt, the gloves, and the iced tea containers all came from the same person, and that that person was petitioner (Yanoff: 945-53).

31. Petitioner presented the testimony of *JAMES MEMISHA*, who was a New York City Police Department detective in 2006. He brought Ernst Pope to North Shore Hospital, showed him to Detective Whitaker, and had him speak for her. Detective Whitaker told Detective Memisha that she was not sure if Mr. Pope was the person who had broken into her room and attacked her, but Detective Memisha indicated on his paperwork that Detective Whitaker had identified Mr. Pope. The notation in Detective Memisha's

paperwork was a mistake, and Detective Whitaker had never identified Mr. Pope as the perpetrator of the crimes against her (Memisha: 1023-27).

32. At the conclusion of the trial, petitioner was convicted of three counts of Burglary in the First Degree (New York Penal Law §§ 140.30[2] and [3]); three counts of Burglary in the Second Degree (New York Penal Law § 140.25[2]); two counts of Assault in the First Degree (New York Penal Law § 120.10 [4]); two counts of Assault in the Second Degree (New York Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (New York Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (New York Penal Law § 130.65[1]). He was sentenced to determinate terms of twenty-five years plus five years of post-release supervision on each first-degree burglary count, fifteen years plus five years of post-release supervision on each second-degree burglary count, twenty-five years plus five years of post-release supervision on each first-degree assault count, seven years plus five years of post-release supervision on each second-degree assault count; twenty-five years plus twenty-five years of post release supervision on the Criminal Sexual Act count; and seven years plus five years of post-release supervision on the first-degree sexual abuse count.

33. The court ran the sentence on the first count, Burglary in the First Degree, concurrently with the sentence on sixth count, Burglary in the Second Degree; the sentence on the seventh count, Burglary in the First Degree, consecutively to the sentence on the first count and sixth count; the sentence on the eleventh count, Criminal Sexual Act in the First Degree, consecutively to the sentence on the first and sixth count, and consecutively to the sentence on the seventh count; and the remaining eight counts – specifically, the second count (Burglary in the First Degree), the third count (Burglary in the Second Degree), the fourth count (Assault in the First Degree), the fifth count (Assault in the Second Degree), the eighth count (Burglary in the Second Degree), the ninth count (Assault in the First Degree), the tenth count (Assault in the Second Degree), and the twelfth count (Sexual Abuse in the First Degree), concurrently with each other and concurrently to the four consecutive sentences under the first, sixth, seventh, and eleventh counts. In total, petitioner was sentenced to a state prison term of ninety years, plus twenty-five years of post-release supervision. Petitioner is currently incarcerated pursuant to this judgment of conviction.

34. In April of 2012 petitioner, through counsel, filed an appeal in the New York State Appellate Division, Second Department, raising three

claims. First, petitioner claimed that the trial court committed reversible error when it denied petitioner's challenge to two prospective jurors who had been crime victims in the past. Second, petitioner claimed that the trial court improperly qualified Natalyn Yanoff as an expert in the statistical significance of the DNA profile and that it improperly limited petitioner's cross-examination of that witness. Third, petitioner claimed that the introduction of DNA evidence violated his right to confrontation because the DNA test results were introduced through an expert who did not test each piece of evidence.

35. In August of 2012, petitioner, *pro se*, filed a supplemental brief raising four claims. First, petitioner claimed that he was denied his right to a speedy trial and that his trial counsel was ineffective for failing to move to dismiss his indictment on that ground. Second, petitioner claimed that the trial court incorrectly charged second-degree burglary and, therefore, improperly shifted the burden of proof. Third, petitioner claimed that his trial counsel was ineffective for failing to request that the burglary counts be charged in the alternative. Fourth, petitioner claimed that his sentence was excessive.

36. On August 13, 2012, the State filed a brief in response to petitioner's main brief, arguing that some of petitioner's claims were

unpreserved in the trial court and that they were all meritless. First, the State argued that the trial court properly denied petitioner's for-cause challenges to the two prospective jurors because, while they might have been victims of a crime in the past, they never expressed any bias against petitioner, any opinion about the case, or an inability to follow the court's instructions on the law. In addition, the State argued that petitioner had failed to preserve his claim as to one of the prospective jurors. Second, the State argued that the trial court properly qualified Natalyn Yanoff as an expert in forensic biology, DNA analysis, and the statistical significance of the DNA profile, and limited petitioner's cross-examination of the witness to relevant issues that would not mislead the jury.

37. Third, the State argued – under both *Williams v. Illinois*, 132 S.Ct. 2221 (2012), and under relevant New York State Court of Appeals decisions – that it properly admitted the DNA evidence through the testimony of the OCME criminalist, who performed the DNA testing on the recovered T-shirt in Ms. Whitaker's case and who interpreted the results generated by other OCME employees in Ms. Gonzalez's and Ms. Brown's cases.

38. On January 28, 2013, the State filed a response to petitioner's *pro se* supplemental brief. First, the State argued that petitioner

failed to provide the Court with a record sufficient to permit review of his speedy trial claim and his claim that his attorney was ineffective for failing to move to dismiss his indictment on speedy-trial grounds in the court below. Second, the State argued that petitioner's claim that the trial court's burglary charge was improper was unpreserved and meritless. The State argued that the court correctly instructed the jury that the State had to prove each of the four elements of Burglary in the Second Degree, that the State had the burden of proving petitioner's guilt beyond a reasonable doubt, and the court explained the definition of reasonable doubt to the jury. Third, regarding petitioner's claims that his attorney was ineffective for failing to object to the court's charge, the State argued that counsel provided him with meaningful representation throughout his trial, and did not object to the court's charge because it was proper. In addition, the State argued that petitioner was not prejudiced by counsel's failure to object to the charge. Fourth, the State argued that the court properly and lawfully sentenced petitioner to ninety years' imprisonment, followed by five years' post-release supervision, based upon the severity of petitioner's crimes, his criminal history, and his failure to show remorse or to accept any responsibility for his own actions.

39. On July 3, 2013, the New York State Appellate Division affirmed petitioner's conviction. First, it held that the trial court acted within its discretion when it denied petitioner's for-cause challenges of the two jurors. *People v. Washington*, 108 A.D.3d 576, 576-77 (2d Dept. 2013). Second, the Appellate Division held that the trial court acted within its discretion when it found that Ms. Yanoff was a qualified expert in statistical DNA analysis and when it precluded petitioner from cross-examining the expert about out-of-state DNA profiles. *Id.* at 577.

40. Third, the Appellate Division held that the DNA documents were properly admitted because, standing alone, they did not link petitioner to the crime, and because the critical analysis was performed by the testifying witness. *Id.* at 577-78.

41. In addition, the Appellate Division rejected the claims raised in petitioner's *pro se* supplemental brief. First, it held that petitioner could not raise his speedy trial claim because he had failed to move to dismiss the indictment on that ground in the trial court. Second, it rejected petitioner's claim that trial counsel was ineffective because that claim could not be resolved without reference to matters outside of the trial record. *Id.* Third, the

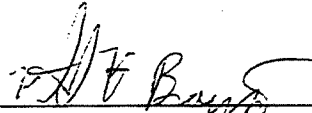
Court held that petitioner's sentence was not excessive. *Id.* Finally, the Court held that his remaining claims were unpreserved and without merit. *Id.*

42. On August 18, 2013, petitioner, through counsel, filed an application for leave to appeal to the New York State Court of Appeals. On January 12, 2014, the State filed a response, and, on January 14, 2014, the Court of Appeals denied petitioner's application. *People v. Washington*, 22 N.Y.3d 1091 (2014).

The Current Petition

43. In his petition, filed in this Court on February 6, 2015, petitioner, through counsel, Jonathan M. Kratter, Esq., claims that the state trial court violated his right to confrontation by admitting evidence of DNA testing at trial without the testimony of the scientists who performed the tests. As explained in the attached Memorandum of Law, the Appellate Division properly applied Supreme Court precedent when admitting the DNA evidence. Indeed, a plurality of the Supreme Court found that similar DNA evidence was admissible to support the conclusions of a testifying expert in *Williams v. Illinois*, 132 S.Ct. 2221 (2012). And a fifth justice found that the same evidence did not offend the Confrontation Clause because – like the evidence in this case – it was not sworn-to or otherwise certified.

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, petitioner's petition for a writ of *habeas corpus* should be denied.



William H. Branigan
Assistant District Attorney
(718) 286-6652

Sworn to before me this
13th day of May, 2015



Notary Public

NANCY TALCOTT
Notary Public, State of New York
Registration #02TA6295261
Qualified in Nassau County 17
Commission Expires Dec. 30, 20__

To: Paul Skip Laisure, Esq.
Appellate Advocates
111 John Street, 9th Floor
New York, New York 10038

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
KENNETH WASHINGTON, :

Petitioner, :

-against- :

THOMAS GRIFFIN, Superintendent, :

Respondent. :

-----X

MEMORANDUM OF LAW

This Memorandum of Law, along with the accompanying Affidavit and Respondent's Exhibits, is submitted in opposition to petitioner's application for a writ of *habeas corpus*.

ARGUMENT

**THE STATE COURT'S DECISION TO
REJECT PETITIONER'S SIXTH
AMENDMENT CLAIM WAS NOT
CONTRARY TO, OR AN UNREASONABLE
APPLICATION OF, CLEARLY ESTABLISHED
SUPREME COURT PRECEDENT.**

Petitioner's claim that the State violated his rights under the Confrontation Clause of the Sixth Amendment does not warrant the granting

of a writ of *habeas corpus* under the highly deferential standard of review mandated by federal law. Indeed, the state court properly rejected this claim on appeal, finding that the DNA documents admitted at trial did not contain “testimonial” statements under the relevant Supreme Court precedent. Petitioner, however, claims that those documents contained out-of-court statements of the DNA technicians who tested the material and, therefore, the State was required to produce those witnesses in order to produce the documents. But petitioner has not shown that the trial court’s ruling rose to the level of constitutional error, let alone that the Appellate Division’s decision to reject this contention was contrary to, or an unreasonable application of, established Supreme Court law, as required for *habeas* relief.

Under 28 U.S.C. § 2254(d), where a state court adjudicates a claim on the merits, a federal court may not grant a writ of habeas corpus unless the petitioner establishes that the state court decision is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. The statute thus imposes a bar to relief unless the petitioner can satisfy this “substantially higher threshold” than the one applicable on *de novo* review. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

When the state court is determined to have adjudicated the claim on the merits, a petitioner's claim fails unless he can show that the State Court's decision rejecting his claim on appeal was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S.362 (2000). In analyzing this issue, "[t]he threshold question is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court convictions became final." *Williams v. Taylor*, 529 U.S. at 390. This means that a petitioner must "identify a clearly established Supreme Court precedent that bears on his claim." *Lolisco v. Goord*, 263 F.3d 178, 191 (2d Cir. 2001). In this regard, a petitioner cannot succeed by showing that the State court misapplied circuit court precedent. *See Yung v. Walker*, 311 F.3d 104 (2d Cir. 2002). If petitioner has failed to identify clearly established Supreme Court precedent, the District Court need go no further. *Sellan v. Kuhlman*, 261 F.3d at 309.

If the petitioner satisfies this hurdle, he must then establish that the decision is either "contrary to" or an "unreasonable application" of the precedent identified. A state court decision is "contrary" to Supreme Court precedent if it applied the incorrect legal standard or rule to the case, or if it

addressed a set of facts “materially indistinguishable” from a relevant Supreme Court case and arrived at a result opposite to that reached by the Court. *Williams v. Taylor*, 529 U.S. at 404-406. In determining whether a state court has “unreasonably applied” Supreme Court precedent, “a habeas court must determine what arguments or theories supported or . . . could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of [the Supreme] Court.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Under this highly deferential standard, “even a strong case for relief does not mean that the state court’s contrary conclusion was unreasonable,” *Id.*, because AEDPA “imposes a ‘highly deferential standard for evaluating state-court rulings,’ *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and ‘demands that state-court decisions be given the benefit of the doubt,’ *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).” *Renico v. Lett*, 559 U.S. 766, 773 (2010). And, in making its determination, the federal court should consider the nature of the rule at issue because “[t]he more general the rule’ at issue – and thus the greater the potential for reasoned agreement among fair-minded judges – ‘the more leeway [state] courts have in reaching outcomes

in case-by-case determinations.” *Renico v. Lett*, 559 U.S. at 776 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 [2004]).

Thus, before “obtaining *habeas corpus* from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. at 103. Indeed, “federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” *Woods v. Donald*, ___ U.S. ___, 135 S.Ct. 1372, *6 (2015).

Here, because the Appellate Division adjudicated the merits of petitioner’s Confrontation Clause claim, its decision is entitled to deference in this Court. And because petitioner cannot show that the state court’s decision was contrary to, or an unreasonable application of, established Supreme Court precedent, the writ should not issue.

Initially, the Appellate Division’s decision rejecting petitioner’s claim constitutes an adjudication on the merits. The court specifically held that petitioner’s right to confrontation had not been violated by the admission of the DNA documents at issue, and, in addition to New York State cases, cited to the

Supreme Court decision of *Williams v. Illinois*, 132 S.Ct. at 2221. Thus, this Court is now required to apply section 2254's deference to that ruling. *Sellan v. Kuhlmann*, 261 F.3d 303 (2d Cir. 2001).

Second, applying that deferential standard of review to this case, the state court's determination cannot be said to have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Supreme Court law. The Supreme Court's decision in *Williams v. Illinois*, 132 S.Ct. at 2221, set forth the "clearly established" federal rule governing petitioner's claim, and, in that case, the Court held that the admission of DNA evidence similar to the evidence at issue in this case did not violate the Confrontation Clause.

Williams v. Illinois is the last in a series of three cases applying the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004) – which interpreted the Confrontation Clause through a historical analysis of the right of confrontation as understood by the framers of the constitution – to forensics reports. The right to confrontation developed, according to the *Crawford* Court, as a response to abuses of the civil law, which "condone[d] examination in private by judicial officers" and which had been incorporated in part into English criminal practice. *Id.* at 43. The framers understood the

right of confrontation to prohibit out-of-court statements similar to the pre-trial examinations by justices of the peace. *Id.* at 68.

The Court held that these “testimonial” statements were inadmissible unless the witness was unavailable and the accused had a prior opportunity to cross-examine the witness. *Id.* at 53-4. The Supreme Court, however, declined to define the term “testimonial” with any specificity, leaving that task to “another day.” *Id.* at 68. The Court concluded that, at a minimum, this new rule would apply “to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations” because “[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” *Id.* at 51-52.

In *Melendez-Diaz*, 557 U.S. 305 (2009), the Supreme Court, applying the holding of *Crawford*, held that certificates of the results of scientific testing of controlled substances recovered from the defendant could not be admitted at trial under the confrontation clause. At trial, the state had “submitted three ‘certificates of analysis’ showing the results of the forensics analysis performed on the seized substances,” reporting the weight of those substances, and concluding that they contained cocaine. *Id.* at 308. “The certificates were sworn to before a notary public by analysts” at the state

laboratory, and were subsequently admitted at trial over the defendant's objections. *Id.* at 308-09.

A five-member majority, relying upon two distinct rationales, held that the certificates were improperly admitted. First, the Court concluded that the certificates were affidavits, squarely within the "core class" of testimonial statements that the framers intended to exclude under the confrontation clause. The Court noted that its prior descriptions of "core testimonial statements" in *Crawford v. Washington*, 541 U.S. 36 (2004), twice included the term "affidavits," and the Court observed that the certificates in *Melendez-Diaz* were, in fact, sworn, notarized affidavits admitted to prove a fact in dispute. The Court therefore concluded that the "analysts' affidavits" were clearly testimonial in nature and were inadmissible, in the absence of prior confrontation and a showing that the witness was unavailable.

Second, the opinion noted that the documents were not only made with the knowledge that they might be used at trial, but that the sole purpose of the documents under Massachusetts law was to provide *prima facie* evidence of the nature and weight of the substance that the defendant was charged with possessing. The analysts were undoubtedly aware of this fact, as it was printed on the certificates themselves. *Id.* at 311. These facts provided

further proof that the statements were testimonial in nature and therefore inadmissible, absent testimony from the analysts.

The twin rationales behind the Court's holding, however, are limited by the concurring opinion written by Justice Thomas, who provided the fifth vote for the Court's majority. In his concurrence, Justice Thomas adopted only the Court's first rationale, that the certificates were affidavits and thus clearly within the ambit of formalized testimonial materials that the framers intended to preclude. He concurred separately to explain that he continued to adhere to his view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* at 329 (Thomas, J., concurring), quoting, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Thus, Justice Thomas joined "the Court's opinion . . . because the documents at issue" were "quite plainly affidavits" and fell "within the core class of testimonial statements governed by the Confrontation Clause." *Id.* at 330 (internal quotation marks omitted).²

²Indeed, as explained in the series of opinions that he cited in his concurrence, Justice Thomas has consistently held a far narrower view of the confrontation clause than that expressed by the other members of the majority. In his concurring opinion in *White v.*

And, because Justice Thomas's vote was necessary for the majority in *Melendez-Diaz* and because it was decided on narrower grounds than stated in the main opinion, that decision has precedential effect only under the rationale stated in Justice Thomas's concurrence. As the Supreme Court explained in *Marks v. United States*, 430 U.S. 188 (1977), "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest

Illinois, Justice Thomas first expressed his view that the confrontation clause should be narrowly construed to implicate only a "discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process." 502 U.S. 346, 365 (1992) (Thomas, J., concurring). These included only formalized testimonial materials, such as "affidavits, depositions, prior testimony, or confessions." *Id.* Later, in *Crawford v. Washington*, 541 U.S. at 51-2, the Court expressly acknowledged Justice Thomas's narrow definition of testimonial statements in *White*, quoting it as one of the possible formulations for this term, but found it unnecessary to adopt one definition over others for the purposes of that case.

In *Davis v. Washington*, 547 U.S. 813, 836-37 (2006), Justice Thomas wrote separately, again expressing his view that "testimonial" statements required "some degree of solemnity," as found in formalized statements such as affidavits, depositions, prior testimony, or confessions. Applying this limitation to the facts in *Davis*, Justice Thomas observed that none of the statements at issue in that case – which included a victim's crime-scene statements to police officers that the majority held were inadmissible – constituted formalized testimonial materials within the ambit of the confrontation clause. *Id.* at 840. Under Justice Thomas's view, these statements did not constitute a "formalized dialogue" similar to the "Marian examinations" held before magistrates and "there was no suggestion that the prosecution attempted to introduce the [statements] at trial in order to evade confrontation." *Id.*; see also *Giles v. California*, 554 U.S. 353, 377-78 (2008) (reiterating view that statements made to police are not testimonial absent "formalized dialogue" similar to Marian bail examinations before magistrates).

grounds....” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 [1976]). In *Melendez-Diaz*, the narrowest grounds were provided by the necessary concurrence of Justice Thomas. Thus, the holding of *Melendez-Diaz* only precluded from trial only sworn statements of fact made out of court for the purpose of introduction as evidence at trial.

Following *Melendez-Diaz*, the Supreme Court decided the case of *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011). In *Bullcoming*, the Court held that a certified laboratory report, containing the results of a blood-alcohol test, could not be introduced into evidence through a second analyst who did not perform or observe that test. *Id.* at 2713. In that case – citing its decision in *Melendez-Diaz* – the Court held that “[a]n analyst’s certification prepared in connection with a criminal investigation or prosecution . . . is ‘testimonial,’ and therefore within the compass of the Confrontation Clause.” *Id.* at 2713-14.

Finally, in *Williams v. Illinois*, 132 S. Ct. at 2221, the Supreme Court held that the admission of laboratory reports containing DNA data at a trial of a defendant for rape did not violate the Confrontation Clause. First, a four-justice plurality held that this evidence, which was admitted to support a testifying expert’s conclusion, did not constitute hearsay and, therefore, did not

violate the Confrontation Clause. *Id.* at 2228. In addition, the plurality provided a “second, independent basis” for its decision, holding that the report would not have violated the Confrontation Clause even if it had been admitted into evidence. The plurality held that the report at issue was “very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach.” *Id.* The plurality found that the lab produced the report not to introduce as evidence against a known defendant, but “for the purpose of finding a rapist who was on the loose.”

The plurality further explained that a DNA profile “tends to exculpate all but one of the more than 7 billion people in the world today,” and that the Confrontation Clause never intended, by compelling the testimony of all the technicians who worked on a report, to “encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.” *Id.* And it noted that a defendant who wished “to probe the reliability of the DNA testing done in a particular case . . . may always” subpoena the technicians. *Id.*

In *Williams*, swabs were taken from a rape victim, sent by a detective to the Illinois State Police lab, and sent to Cellmark Diagnostics

Laboratory for testing. *Id.* at 2229. The Cellmark lab then produced a report of a male DNA profile, which was later matched to the defendant. *Id.* At trial, three forensic analysts testified, including a DNA analyst who testified that the defendant's DNA matched the DNA recovered from the victim. *Id.* at 2230. That expert based her opinion on a series of reports from Cellmark, which were not admitted into evidence, and she was cross-examined about her knowledge of Cellmark's practices. *Id.* at 2230-31.

Addressing the defendant's Confrontation Clause claim, the four-member plurality of the Court first noted that the Clause excluded from evidence only statements that were offered to prove the truth of the matter asserted. *Id.* 2235. And it found that the DNA expert testified to the truth only for matters about which she had personal knowledge. *Id.* While the expert testified to a conclusion based upon the premise that semen was recovered from vaginal swabs taken from the victim, the Court found that there was no evidence that the fact-finder – in that case the trial court – took the answer based upon this premise as substantive fact. *Id.* at 2236. To the extent that this “basis” evidence was admitted, reasoned the plurality, it was for the nonhearsay purpose of showing the logic of the expert's reasoning. *Id.* at 2240.

The *Williams* Court also distinguished *Melendez-Diaz* and *Bullcoming*, finding that the certified forensics reports in those cases were admitted for the purpose of proving the truth of the matter. *Id.* In *Williams*, the report was not admitted to establish that it contained the defendant's DNA profile, but only for the limited purpose of determining whether there was a match between the profile of the DNA taken from the defendant's blood and the report from Cellmark. *Id.* at 2240.

Second, after determining that the report was not admitted for its truth, the plurality held that there would still be no Confrontation Clause violation even if the report had been admitted for its truth. *Id.* at 2242. The Court noted that the recent cases addressing the Confrontation Clause had found two rationales for finding an abuse – the statements were made for the primary purpose of accusing someone of criminal conduct or were formalized statements “such as affidavits, depositions, prior testimony, or confessions.” *Id.* In *Melendez-Diaz* and *Bullcoming*, the excluded documents were the equivalent of affidavits created for the purpose of proving guilt at trial, and the technicians who prepared them must have understood their incriminating nature. *Id.* at 2243.

Under this primary purpose analysis, the plurality held that the reports at issue in *Williams* were created to catch a rapist, and that the technicians could not have known that the generated reports would implicate the defendant. *Id.* at 2243-44. Indeed, the Court noted that DNA lab technicians generally do not know whether their work “will turn out to be incriminating or exonerating – or both.” *Id.* at 2244. Thus, “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’” *Id.* (quoting *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 [2011] [Thomas, J., concurring]).

The plurality was joined by two concurrences. The first, by Justice Breyer, joined the plurality opinion in full. *Id.* at 2252. The second, by Justice Thomas, joined only in the result and disagreed with the plurality’s holding that the statements were not hearsay. *Id.* at 2255-56. Instead, Justice Thomas – following his own jurisprudence discussed above – found that the report was testimonial because, unlike the affidavits in *Melendez-Diaz* and *Bullcoming*, it was “neither a sworn nor a certified declaration of fact.” *Id.* at 2260. While the “report [was] signed by two ‘reviewers,’” they did not

“purport to have performed the DNA testing [or] certify the accuracy of those who did.” *Id.* at 2260.

Here, under similar facts to those in *Williams*, this Court should not disturb the State court’s determination that petitioner’s right to confront witnesses was not violated. At trial, the State sought to introduce into evidence three files that were generated by the OCME laboratory as business records (Yanoff: 907-09). Ms. Yanoff testified that each of the three cases on trial had a team of DNA analysts working on it, and each case was assigned an interpreting analyst, whose job was to review all of the paperwork in the case file and to make conclusions on the findings (Yanoff: 910). Ms. Yanoff testified that she did not prepare every document that was contained in each case file, but that she did personally examine the evidence related to case number FB06-1479 (Cassandra Whitaker’s case), and she personally prepared the reports on all three cases (Yanoff: 909-912). Defense counsel objected to the admission of the files on the ground that their admission violated the New York State and Federal constitutions because the file contained paperwork that was prepared based on work done by other people who the defense would not have an opportunity to confront (Yanoff: 912-13). The court overruled

petitioner's objection, and admitted the three files into evidence (Yanoff: 914-16).³

Here, the admission of the OCME reports did not violate the Confrontation Clause as it has been defined by either the plurality or concurring opinion in *Williams*. Under the plurality's rationale, the reports were admissible both because they were admitted to explain the reasoning of the testifying expert – and not for their truth – and because they were not made with the primary purpose of establishing petitioner's guilt. First, as discussed above, *Williams* held that an expert witness may testify to an opinion based upon facts of which she has no personal knowledge. *Williams v. Illinois*, 132 S. Ct. at 2233. And because these underlying facts are introduced solely to demonstrate the basis of the expert's reasoning – and are not considered for their truth – there is no Confrontation Clause violation. *Id.* at 2235. For this reason alone, the documents were admissible.

Second, the files in this case were not testimonial because they did not have the primary purpose of establishing the guilt of a targeted individual. See *Williams v. Illinois*, 132 S.Ct. at 2243-44; *People v. Brown*, 13 N.Y.3d

³ The files were admitted as People's Exhibits 33, 34, and 35.

332, 340 (2009). The OCME technicians who prepared the DNA reports of the biological material recovered in the three cases could not have had the “primary purpose” of creating evidence for use in petitioner’s case because he was not a known suspect at the time they tested the material.

Moreover, none of the technicians preparing the DNA reports – including those who tested the swab taken from petitioner – had any purpose other than performing some discrete step in the testing process. Indeed, the OCME is not a law-enforcement entity and no technician at the OCME’s office could have known if the profile she created would actually incriminate anyone; in fact, it is possible that the results of the OCME tests would have exonerated someone. As the plurality held, “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’” *Id.* (quoting *Michigan v. Bryant*, 562 U.S. 344 [2011] [Thomas, J., concurring]). And Ms. Yanoff explained at trial that the samples were prepared by an assembly line of analysts (Yanoff: 910-11; 985-87). Their primary purpose was to prepare the biological samples for processing in a machine, and they could not have replicated petitioner’s DNA, had they intended to, with a computer-generated series of graphs.

Indeed, examining the admitted documents, the key information interpreted by the testifying analyst was a series of computer-generated graphs (Yanoff: 986). The lab technicians did nothing other than prepare the samples for this final process. It was the *machine* that produced a profile that was ultimately interpreted at trial. *See People v. Brown*, 13 N.Y.3d 332, 340 (2009) (admitted DNA report not testimonial “because it consisted of merely machine-generated graphs, charts and numerical data”). Therefore, no one at OCME “could have possibly have known that the profile that it produced would turn out to inculcate” petitioner. *Williams*, 132 S. Ct. at 2243-44. Thus, each lab technician’s “primary purpose” was to perform her specific duty in processing biological materials, not to create a statement for the introduction as evidence at petitioner’s trial.

The only OCME employee who offered a statement intended to be admitted at trial was Ms. Yanoff, who reviewed the process and interpreted the machine-generated profile. As the analyst who read the computer generated data and testified to the result, she was, therefore, the one analyst whose testimony was necessary in court. Indeed, unlike the surrogate analyst who testified in *Bullcoming* – who offered testimony that “could not convey what [the technician who performed the test and certified the results] knew or

observed about the events his certification concerned, i.e., the particular test and testing process he employed,” *Bullcoming v. New Mexico*, 131 S. Ct. at 2715 – the analyst here supervised the process and analyzed the results. And unlike the testifying analyst in that case, she did not have to rely on a witness’s certification of the machine-generated results because she had the printout made by the machine. Thus, the one analyst who made a statement for the purpose of establishing a fact at trial made her statements under oath at that trial.

In addition, applying the holding of Justice Thomas, the DNA reports at issue and Ms. Yanoff’s testimony about them were admissible. In this case, the certification on People’s Exhibits 33, 34, and 35 merely attested to the fact that file was a business record, and that the copy of the records provided to the parties was a true and correct copy of the original records. Nowhere in the records is there any certification as to the accuracy of the results contained in the records. Exhibits 33, 34, and 35 contain mostly charts, graphs, and numerical data, and the signatures that appear within the records do not certify the accuracy of the results. As such, the records at issue in this case are no more formal than those in *Williams*, and so they were properly admitted in this case.

Nevertheless, despite the similar nature of the facts of this case and *Williams*, petitioner claims that the Appellate Division unreasonably interpreted that case by finding that the admission of the DNA reports did not violate the Confrontation Clause. First, to the extent that petitioner relies on the Court's holdings in *Melendez-Diaz* and *Bullcoming* (Petition: 18-19), a majority of the Supreme Court simply *never* has held that the admission of unsworn documents from a scientific laboratory violate a defendant's right to confrontation. In both of those decisions, sworn-to laboratory reports were admitted at trial to prove the truth of the matter asserted. In his concurrence in *Melendez-Diaz*, Justice Thomas clarified that he only was joining the majority opinion adopted under one of the Court's rationales – that the certificates were affidavits and thus clearly within the ambit of formalized testimonial materials that the framers intended to preclude. He adhered to his view that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 329 (Thomas, J., concurring), quoting, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Without this fifth vote, the *Williams* dissenters *never* could have formed a majority to apply their “primary

purpose” test to the work done in a certified scientific laboratory. Thus, *Bullcoming* and *Melendez-Diaz* are constrained to preclude only the admission of sworn-to affidavits at trial, and say nothing about the documents at issue here.

In addition, as discussed above, while defendant attempts to distinguish this case because he was swabbed and tested after his arrest, the plurality in *Williams* still would have admitted the report (Petition: 18-9). First, as discussed above, *Williams* held that an expert witness may testify to an opinion based upon facts of which she has no personal knowledge. *Williams v. Illinois*, 132 S. Ct. at 2233. And because these underlying facts are introduced solely to demonstrate the basis of the expert’s reasoning – and are not considered for their truth – there is no Confrontation Clause violation. *Id.* at 2235.

Second, as discussed above, the primary purpose of the lab technicians was not to accuse defendant, because the computer generated the only relevant information that was interpreted at trial by the testifying analyst. The technicians simply processed the biological material. And while *Williams* noted that the lab’s purpose in that case was, in part, to catch a rapist, it also found that, where, as here, a group of technicians works on a sample, “it is

likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.” *Id.* at 2244. Therefore, the plurality would have found no Confrontation Clause violation under the circumstances here.

And, as discussed above, Justice Thomas would find that petitioner’s confrontation rights were violated under the circumstances here because the lab results were not sworn-to by an out-of-court declarant. Thus, five justices would find this DNA evidence admissible.

In addition, a different result was not warranted in this case because, as petitioner claims, it was tried in front of a jury and not solely a judge (Petition: 18, FN 5). While the plurality noted that the dissent was misguided in thinking that certain testimony might have confused a trial judge, that was simply dicta. *Williams*, 132 S.Ct. at 2236-37. The right to confrontation is the same in front of a jury as in front of a judge.

Finally, in the *habeas* posture of this case, petitioner simply cannot claim that any clear Supreme Court precedent exists that would compel a granting of his petition. The Supreme Court, quite clearly, is fractured and cannot muster a majority on this issue. Under these circumstances, the decision of the New York State Appellate Division that the admitted DNA

profiles – which did not contain any sworn-to statements and which had to be interpreted by an expert who testified live at trial – did not violate petitioner’s right to confrontation was “eminently reasonable and entirely consistent with relevant Supreme Court precedent.” *Thompson v. Besio*, ___ F. Supp. ___, 2014 U.S. Dist. LEXIS 52144, *22 (E.D.N.Y. 2014). Indeed, no majority of the Court ever has held that the admission of unsworn DNA documents violated the Confrontation Clause.

In sum, the state court properly admitted the DNA documents at trial and the admission of those documents did not violate petitioner’s right to confront the witnesses against him. Because petitioner has failed to show that the state courts contravened or unreasonably applied Supreme Court precedent in rejecting his contention, petitioner’s claim must be denied.

CONCLUSION

For the reasons set forth above, petitioner's petition for a writ of *habeas corpus* should be denied.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens Counsel

JOHN M. CASTELLANO
JOHNNETTE TRAILL
WILLIAM H. BRANIGAN

Assistant District Attorneys
of Counsel

May 13, 2015

COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

KENNETH WASHINGTON,	:	
Petitioner,	:	
-against-	:	15-CV-0603 (FB)
THOMAS GRIFFIN, Superintendent,	:	
Green Haven Correctional Facility,	:	
Respondent.	:	

-----x

REPLY MEMORANDUM OF LAW

BECAUSE THE UNITED STATES SUPREME COURT HAS CLEARLY ESTABLISHED THAT A FORMALIZED DNA TEST REPORT CONCERNING A SAMPLE TAKEN FROM AN INDIVIDUAL ACCUSED OF A CRIME TO PROVE HIS GUILT IS TESTIMONIAL, PETITIONER HAS DEMONSTRATED THAT THE STATE COURT DECISIONS PERMITTING THE INTRODUCTION OF SUCH A REPORT THROUGH A WITNESS WHO LACKED FIRSTHAND KNOWLEDGE OF THE TESTING AND WHO DID NOT DEVELOP THE PROFILE WAS AN UNREASONABLE APPLICATION OF FEDERAL LAW AS CLEARLY ESTABLISHED BY THE UNITED STATES SUPREME COURT IN CRAWFORD v. WASHINGTON, 541 U.S. 36 (2004); BULLCOMING v. NEW MEXICO, 131 S.Ct. 2705 (2011), AND WILLIAMS v. ILLINOIS, 132 S.Ct. 2221 (2012).

In its response, the State argues that Petitioner has not demonstrated a violation of clearly established federal law as determined by the Supreme Court (Affidavit and Memorandum of Law in Opposition ("Response") at 27-34. However, in relying on Williams v. Illinois, 132 S.Ct. 2221, 228 (2012), the State failed to account for the fact that the DNA report underlying the contested

expert testimony was not introduced in evidence in that case, as it was in this one (see Response at 38). The distinction is important because, in Williams, not having been introduced into evidence, the "fact" of the DNA profile in the underlying report that the testifying analyst was discussing was not introduced for its truth. Here, the DNA report concerning petitioner's cheek swab was introduced in evidence and, therefore, was offered to prove its truth. Moreover, the records in this case were admitted for their truth as they were certified in accordance with C.P.L.R. § 4518 (made applicable to criminal proceedings by C.P.L. § 60.10), which states that "DNA records or reports . . . are prima facie evidence of the facts contained therein". As a result, petitioner's case is in the posture the Supreme Court addressed in the second part of its opinion.

In Williams, the Court stated the rule to be derived from Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and its other prior cases, in the following manner:

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.

Williams had not been identified as a suspect when the testing was done. Rather, the testing was done in an impartial manner for the

primary purpose of finding a dangerous rapist, not for the purpose of prosecuting a known suspect. Id. at 2242. Here, the testing in question was of Petitioner's DNA, after his arrest, for the purpose of developing evidence that he was guilty of the crime of which he had been accused. Accordingly, the DNA testing "involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct." Id. Petitioner argues that the formal report compiled by analysts within the OCME could not be admitted unless all of the analysts who developed the DNA profile that was used to convict petitioner were available for cross-examination.

The exhibit that was introduced at petitioner's trial included a certification that what followed was an official business record of the OCME, the conclusion of the analyst who testified that petitioner's DNA profile matched the one developed from the crime scene, and the underlying report of analysts who did not testify stating petitioner's DNA profile. Had the State introduced only that portion of the report in which the testifying analyst had noted a match, there would not, under the Williams plurality decision, have been a Confrontation Clause violation. When it introduced the entire report, however, it was required to do so through the testimony of all the analysts who contributed to the development of petitioner's profile.

The State claims that this is not true because that portion of the DNA report written by non-testifying analysts was not

accompanied by a sworn affidavit (Response at 39-41).¹ That argument fails for the simple reason that the exhibit the State admitted into evidence was a single report certified as an official business record of the OCME, not a series of separate reports. Because the certification of that exhibit bears the OCME seal and is signed by a certifier attesting, under C.P.L.R § 4518, that it is "a true and accurate copy" of the original records maintained by OCME, the exhibit as a whole meets the formality requirements outlined by the Supreme Court. *Melendez-Diaz*, 557 U.S. at 310 ("Certificates of Analysis"); *Williams*, 132 S.Ct. at 2255, 2260-261 (Thomas, J., concurring in the judgment) (DNA reports "lacked the requisite 'formality and solemnity' to be considered 'testimonial'").²

The State also claims that the analysts who developed the DNA profile from petitioner's cheek swab did not have the primary purpose of creating evidence against petitioner because they had merely performed discrete steps in a scientific process (Response at 39). But the Supreme Court has already dispensed with any such argument in *Melendez-Diaz* and *Bullcoming*, both of which were scientific testing cases in which, presumably, the analysts would also have been performing discrete steps in a testing process. Indeed, in *Melendez-Diaz*, the Court expressly stated that the cross-examination requirement applied to "forensic scientists" to "weed out" both fraud and incompetence. 547 U.S. at 319.

The DNA report concerning petitioner's cheek swab, which was introduced into evidence in its entirety as People's Exhibit 39, is submitted as Exhibit F to the Petition.

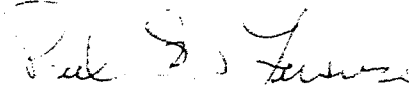
In short, Petitioner was targeted and under arrest for these crimes when the cheek swab was taken and tested, and the resulting DNA report was certified as a business record of the OCME. Under the clearly-established rule of Melendez-Diaz and Bullcoming, as specifically reaffirmed in Williams, the portion of the report that was prepared by persons not called to testify was clearly testimonial. The State trial court's admission of the entire exhibit, in the absence of petitioner's opportunity to cross examine all of its authors, violated petitioner's Confrontation Clause rights. The Appellate Division's holding to the contrary was an unreasonable application of federal constitutional law as established by the Supreme Court in those cases.

CONCLUSION

FOR THE REASONS ADVANCED ABOVE, THE PETITION
FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

Respectfully submitted,

LYNN W. L. FAHEY
Attorney for Kenneth Washington


By: Paul Skip Laisure

DATED: New York, New York
June 2, 2015

EXHIBIT F

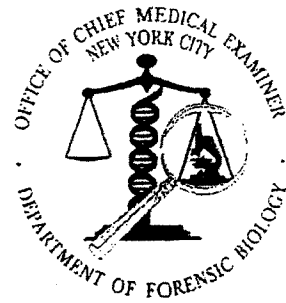
A000380

A570



OFFICE OF CHIEF MEDICAL EXAMINER
520 FIRST AVE. NEW YORK, NEW YORK 10016

Department of Forensic Biology
421 East 26th Street, New York, New York 10016
Mechthild Prinz, PhD, Director
Telephone: 212 323 1200 Fax: 212 323 1590
Email: mprinz@ocme.nyc.gov
Official Website: <http://www.nyc.gov>



Certification as a Business Record

I, Sandra Matos, have been delegated to certify records by
Charles S. Hirsch, M.D., Chief Medical Examiner of the Office of Chief Medical Examiner according to Rule
4518 of the New York Civil Practice Law and Rules.

The Office of Chief Medical Examiner is a governmental office organized under §557 of the New York City
Charter and Sections 17-201 through 17-206 of the New York City Administrative Code.

All records contained in the Office of Chief Medical Examiner Department of Forensic Biology case file
number: FB07-S0596 (2 of 2), page numbers: NA, or other
identifying information such as: _____

_____ were prepared by the Office of Chief Medical Examiner in the regular course of
business within the Department of Forensic Biology. It is the regular course of business of the Office of Chief
Medical Examiner Department of Forensic Biology to prepare the records attached to this certification.

I have examined the original records maintained by the Department of Forensic Biology concerning case file
number: FB07-S0596 (2 of 2), page numbers: NA,
or other identifying information such as: _____

I have compared the copies of these records to the originals, and I attest that the records attached to this
certification are a true and accurate copy of the originals records maintained by the Office of Chief Medical
Examiner Department of Forensic Biology.

On this 19th day of May, 2010 I have affixed the official seal of the
Office of Chief Medical Examiner to certify these copies as genuine and as business records of the Department
of Forensic Biology.

Sandra Matos
Signature of Name of Certifier

[Seal of the Office of Chief Medical Examiner]

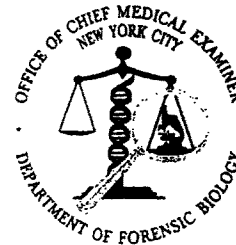
A000381

A571



OFFICE OF CHIEF MEDICAL EXAMINER
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Mechthild Prinz, PhD, Director
Telephone: 212.323.1200 Fax: 212.323.1590
Email: dnalab@ocme.nyc.gov
Official Website: <http://www.nyc.gov/ocme>



DATE: April 26, 2010

LABORATORY REPORT

SUSPECT: Kenneth Washington	NYSID NO: 8120861Z	LAB NO: FB07-S0596
COMPLAINT NO: 2006-105-07354 2006-105-10865 2007-113-06277	ARREST NO: Q07658723R	START DATE: 04/22/10

ADDITIONAL REPORT

This is an additional report. For previous results, evidence received, and disposition, see report dated April 4, 2008.

SUMMARY OF RESULTS:

The DNA alleles from the suspect, Kenneth Washington, are the same as the DNA alleles of the male donor from cases:

FB number	victim's name	report dates
FB07-02443	██████████	November 19, 2007
FB07-01468	██████████	August 29, 2007
FB06-1479	UC#7615	December 15, 2006

The DNA alleles from the suspect, Kenneth Washington, do not match any other previous PCR (STR) DNA cases to date.

The DNA results above will be entered into the OCME local DNA databank.

A000382

A572

EXAMINATIONS:

Blood and other physiological fluids and tissues contain polymorphic ("many forms") genetic markers which can differ from person to person. These genetic markers are inherited, that is, pass from generation to generation and can be used to compare biological samples from different sources. Genetic markers occur because of changes (mutations) that occur in a person's hereditary material, DNA (Deoxyribonucleic Acid).

DNA can be recovered from biological samples such as blood, bone, hair, saliva, semen, and skin cells. Using a technique known as quantitative real time polymerase chain reaction (qRT-PCR), the amount of DNA extracted from samples can be measured. If sufficient DNA is detected, further DNA testing can be performed.

Alternative forms of DNA are called alleles; they are found at the same location of the DNA (locus, plural loci) on homologous (matching) chromosomes. An individual can have a maximum of two different alleles at a particular locus, one on each homologous chromosome. A group of two alleles from the same locus constitutes a type.

Several different loci may be analyzed simultaneously using a technique known as the polymerase chain reaction (PCR). This technique allows small amounts of DNA to be amplified; after amplification, the alleles present in the sample are identified.

The loci tested may include the short tandem repeat (STR) loci [D8S1179, D21S11, D7S820, CSF1PO, D3S1358, TH01, D13S317, D16S539, D2S1338, D19S433, vWA, TPOX, D18S51, D5S818, FGA]. The STR loci exhibit length polymorphisms which are variations in the number of core repeats, which are 4 base pairs in length. STR alleles are named according to the number of core repeats present at the locus. Each locus has between 8 and 32 identifiable alleles.

The loci tested may also include the Amelogenin locus, which is located on the chromosomes X and Y, and can be used to determine the sex origin of an unknown sample.

Locus	Chromosome	Alleles
D8S1179	8	<8, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, >19
D21S11	21	<24, 24, 24.2, 25, 26, 27, 28, 28.2, 29, 29.2, 30, 30.2, 31, 31.2, 32, 32.2, 33, 33.2, 33, 33.2, 34, 34.2, 35, 35.2, 36, 37, 38, >38
D7S820	7	<6, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, >15
CSF1PO	5	<6, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, >15
D3S1358	3	<12, 12, 13, 14, 15, 15.2, 16, 17, 18, 19, >19
TH01	11	<4, 4, 5, 6, 7, 8, 8.3, 9, 9.3, 10, 11, 13.3, >13.3
D13S317	13	<8, 8, 9, 10, 11, 12, 13, 14, 15, >15
D16S539	16	<5, 5, 8, 9, 10, 11, 12, 13, 14, 15, >15
D2S1338	2	<15, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, >28
D19S433	19	<9, 9, 10, 11, 12, 12.2, 13, 13.2, 14, 14.2, 15, 15.2, 16, 16.2, 17, 17.2, >17.2
vWA	12	<11, 11, 12, 13, 14, 15, 15.2, 16, 17, 18, 19, 20, 21, 22, 23, 24, >24
TPOX	2	<6, 6, 7, 8, 9, 10, 11, 12, 13, >13
D18S51	18	<7, 7, 9, 10, 10.2, 11, 12, 13, 13.2, 14, 14.2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, >27
D5S818	5	<7, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, >16
FGA	4	<17, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 26.2, 27, 28, 29, 30, 30.2, 31.2, 32.2, 33.2, 42.2, 43.2, 44.2, 45.2, 46.2, 47.2, 48.2, 50.2, 51.2, >51.2

EVIDENCE RECEIVED:

ITEM	VOUCHER	DATE RECEIVED	DESCRIPTION
1	R361863	04/21/10	buccal swab from Kenneth Washington

DISPOSITION:

The following items will be retained in the laboratory:

DNA extracts from samples and controls tested

The remainder of the evidence has been returned to the OCME Evidence Unit.

Analyst: _____

N. Yanoff
Natalya Yanoff
Criminalist III

Administrative Review Date: _____

4/29/10

Administrative Reviewer: _____

SAS

FORENSIC BIOLOGY - REPORT ROUTE SHEET		
DATE EFFECTIVE 07-11-2009	APPROVED BY P. Wojtowicz	PAGE 1 of 1

FB number FB07-S0596

Initials/Date: NY 4/26/10

Please send this report to the following (circle all that apply):

1. OCME Records

2. NYPD ECMS Complaint Number(s): 2006-105-07354
2006-105-10865
2007-113-06277

3. DA Office: Bx K M Q R

Offense Type Robbery Victim/Complainant* U42042110
Burglary VC#7615
Rape
 Suspect** Kenneth Washington

*If available; if multiple victims, enter one name

**Enter when file has no listed victim (e.g., S files, CPW cases); if multiple suspects, enter one name

Borough	Designated E-Mail Address for Reports to DAOs
Bronx (Bx)	singerr@bronxda.nyc.gov
Brooklyn (K)	OCMEfbio@brooklynda.org
Manhattan (M)	silberberg1@dany.nyc.gov
Queens (Q)	ecrosenbaum@queensda.org
Staten Island (R)	DNA@rcda.nyc.gov

4. Other (e.g., outside jurisdiction, corporation counsel, AUSA)

Name of Recipient _____

E-mail _____ or FAX _____

Other information _____

Distribution Completed (Initials/Date): JW 043010

Controlled versions of Department of Forensic Biology Documents exist only on the OCME intranet.
 All printed versions are non-controlled copies.

A000386

A576

Forensic Biology - DNA PROFILE EVALUATION FORM

DATE EFFECTIVE
1/27/2010

APPROVED BY
Eugene Lien

PAGE
1 of 1

Laboratory No: FB07-S0596

Form Prepared By: FC *FC*

Specimen ID*: N/A

Interpreting Analyst¹: NY

Suspect's Name: Kenneth Washington

Source of profile identified: (Y) N

Profile Type
Suspect Profile

LINKAGE Status

Specimen Category / Index

Linkage in only
LINKAGE
No Linkage

Suspect, Known
None

CODIS CORE LCI

D3S1358	vWA	FGA	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820
14, 15	16, 18	20, 21	12, 17	30, 35	14, 17	12, 13	11, 12	10

CODIS CORE LCI

D16S539	TH01	TPOX	CSF1PO
9, 13	6	6, 8	11

OTHER LCI

D2S1338	D19S433
19, 22	13, 15.2

Amelogenin

Amelogenin
X, Y

Match to any other cases locally? (Y) N

If yes, list other specimen ID's below:

07-02443-395-GIA-0

In LDIS? (Y) N

07-01468-003-CS-0

In LDIS? (Y) N

06-1479-227-TSS-0

In LDIS? (Y) N

In LDIS? Y N

Eligible Profiles - see the CODIS manual for complete eligibility requirements

Profile checked against Lab Types

Initials CDG

Date 4-26-10

Profile checked against LINKAGE

Initials CDG

Date 4-26-10

Profile checked against LDIS

Initials NY

Date 4/26/10

Profile entered into LINKAGE

Initials CDG

Date 4-26-10

Profile review² by

Initials sew

Date 042810

Initials _____

Date _____

Profile entered into LDIS

Initials N/A

Date N/A

SDIS upload/search confirmed

Initials N/A

Date N/A

1. The Interpreting Analyst, by initialing here, is acknowledging that the DNA profile is eligible for LINKAGE and/or the appropriate specimen category.

2. Profile review includes evaluation of the data associated with the DNA profile, review of associated positive and negative controls, confirming the eligibility of the DNA profile for LINKAGE and/or the appropriate specimen category, as well as ensuring that appropriate exemplars and/or elimination samples have been requested at least twice.

A000387

A577

FORENSIC BIOLOGY - DNA EXTRACTS TRACKING WORKSHEET		
DATE EFFECTIVE 12/7/2009	APPROVED BY Eugene Lien	PAGE 1 of 1

FB07-S0596

	EXTRACTION DATE: 04/23/10 TIME: 08:00
A	(s) KW dup
B	
C	
D	
E	
F	
G	
H	
I	
J	
K	
L	
M	
N	
O	
P	

SAMPLE(S)	ALIQOT BY	DATE	PURPOSE
A	RMM	4/23/10	1D28

SAMPLES IN CRYOBOX E703/E704

A000388

A578

FORENSIC BIOLOGY - DNA EXTRACTS TRACKING WORKSHEET

DATE EFFECTIVE
12/7/2009

APPROVED BY
Eugene Lien

PAGE
1 of 1

FB07-S0596

	EXTRACTION DATE: 04/22/10	TIME: 14:45
A	(s) KW	
B		
C		
D		
E		
F		
G		
H		
I		
J		
K		
L		
M		
N		
O		
P		

SAMPLE(S)	ALIQOT BY	DATE	PURPOSE
A	JW	4/23/10	1028

SAMPLES IN CRYOBOX E703

A000389

A579

**OFFICE OF THE CHIEF MEDICAL EXAMINER
EVIDENCE TRACKING FOR DNA/SEROLOGY ONLY**

FB# 07-50596

EVIDENCE UNIT CONTROL # 10-M005531

Subject(s) (V) [REDACTED]
(V) [REDACTED]
(S) WASHINGTON, KENNETH

M.E.# _____
M.E.# _____
M.E.# _____
M.E.# _____

EVIDENCE SUBMITTED (As listed on vouchers) Each voucher will have its own custody form.

VOUCHER #	ITEM# - QTY	DESCRIPTION
R361863	1	DNA BUCCAL SWAB COLLECTION KIT
# of Packages 1 ENVELOPE		
Storage # N / A		
Security Envelope # N / A		
Narcotic Envelope # N / A		

CHAIN OF CUSTODY: Black or Blue ink

VOUCHER	ITEM (S)	RECEIVED FROM	RECEIVED BY	DATE
R361863	1	To [Signature]	C. MANTUANO ⁷⁰³	04/21/10
R361863	1	C. MANTUANO 703	PAGEA	04/21/10
R361863	1	Anger	N Gonzales 623	4/21/10
R361863	1	U Gonzales 623	SLOAN	4/21/10
R361863	1	SLOAN	[Signature]	4/22/10
R361863	1	[Signature]	[Signature]	4/22/10
R361863	1	Cage 2	Draugh 623	4/22/10
R361863	1	Draugh 623	AI-02	4/22/10
R361863	1	AI-02 4/24/10	Ameriel	4/22/10
R361863	1	Ameriel 623	[Signature]	4/22/10
R361863	1	[Signature]	Bruce 13	4-22-10
R361863	1	Bruce 13	In Png B1-D1	4-22-10
R361863	1	In Png B1-D1	Bruce 13	4-22-10
R361863	1	Bruce 13	[Signature]	4/22/10

R361863

* empty packaging returned. See above for items retained at laboratory.

** rape kit returned. Includes all items not listed for retained storage.

4/29/10 *** items submitted as reference samples. To be vouchered by evidence DNA unit, except swabs.

A000391

A581

FORENSIC BIOLOGY - Schedule of Analysis

DATE EFFECTIVE
2/16/2010

APPROVED BY
Eugene Lien

PAGE
1 of 1

Item(s)	Voucher	EU#	ANALYSIS	Target Date	Signed in by:
1	R361863	10-M05531	X, F, G, J, R	05/22/2010	

Schedule of Analysis Approved By: N/A

- A Check for amylase
- B Check for blood
- C Check for semen
- D Sexual assault kit: process kit; check for sperm and/or P30 (P30 only on sperm negative items)
- E Cut/ Scrape/ Swab for epithelial cells
- F Extraction and Quantitation
- G DNA typing
- H Cut swab if blood is found on associated NYPD swab or actual item
- J Compare to submitted exemplars/database/reference case no. _____
- L LCN DNA testing
- M MtDNA testing
- N Do not schedule for examination until supervisor establishes case status
- O No further DNA testing until necessary exemplar(s) is/are obtained
- R Write report
- U Examine outer most garments, submit a maximum of three KM+ stains for DNA testing
- X Process exemplar (if necessary)
- Y Do not examine
- Z Other _____

FB07-S0596

Analyst NY

Report Date 4/26/10

Technical review by: den Full ☒ Limited-scope ☐ Date 04/28/10

_____ Full ☐ Limited-scope ☐ Date _____

DNA Database review by: _____ Date _____

_____ Date _____

Schedule Of Analysis

A000392

A582

DNA / SEROLOGY SUBMISSION TRACKING & PRODUCTIVITY FORM

FB #- FB07-S0596

Date Received by Evidence Unit: 4/21/2010

Date Received by Forensic Biology: 4/22/2010

Start Date (Date Physical Evidence Started): 4/22/2010

Analyst Initials: NY NY

CODIS profile? No

Hospital: N/A

Voucher Number or PM Item	Number of Items Received*	Number of Items Examined	Number of Items Not Examined	Date of Last Technical Results
R361863	1	1		4/24/2010
SUBTOTAL (pg. 2)				
TOTAL:	1	1		

*This number is based on real content of the bags and kits.

Total number of items examined		1
Number of samples submitted for DNA extraction		2
Number of samples submitted for quantitation		2
Number of samples amplified - STRs		2
Number of STR case sample injections analyzed:		
Identifier: 2	YM1:	PPY:
Minifiler:		2
Number of STR loci interpreted	Identifier: 2 x 16 loci =	32
	YM1: x 4 loci =	
	PPY: x 11 loci =	
	Minifiler: x 9 loci =	32
Total Number Semen Examinations:		
AP tests:	+ p30 tests:	+ sperm searches:
Total Semen Exams:		
TOTAL NUMBER OF EXAMINATIONS :		
Total Semen tests:		
Total Amylase tests:		
Total KM tests:		
Total Serology Tests:		
TOTAL OF ALL TESTS:		41

25 of 25

A000393

A583

Page
1 of 1Page
1 of 1[illegible]

CODIS loci order

[illegible]

^a = Typing not attempted

Additional peaks were detected which did not meet laboratory criteria for allele identification; therefore, these additional peaks are not listed

NEG = No alleles detected

— This allele may be the result of a PCR artifact known as stutter or could be from an additional DNA donor

INC = The most likely DNA profile of the DNA donor could not be determined at this locus

Z = Another allele may be present at this locus

Notes:

Notes:

Approved By:
Filomena Lien

Case No: FB07-S0596

[illegible][illegible]

Z = Another allele may be present at this locus

Notes:

Page
1 of 1

Identifiler loci order

[illegible]

CODIS loci order

[illegible]

* = Typing not attempted

** = Additional peaks were detected which did not meet laboratory criteria for allele identification; therefore, these additional peaks are not listed

NEG = No alleles detected

-- = This allele may be the result of a PCR artifact known as stutter or could be from an additional DNA donor

INC = The most likely DNA profile of the DNA donor could not be determined at this locus

Z = Another allele may be present at this locus

Notes:

LN

ms

PAGE:
1 of 1

ANALYST: JLN

[illegible]

Comments: RQ = Samples that require requantitation
 * = Sample exhibits background fluorescence
 ** = Sample exhibits low background fluorescence
 Δ = Sample quantitation inhibited
 A = Distribute to analyst
 M = Submitted to Auto-Microcon

21

N4

A000397
A587

Forensic Biology- ROTORGENE DATA COLLECTION

DATE APPROVED:
1/4/2010

APPROVED BY:
Eugene Lien

PAGE:
1 of 1

Run Name: RG8Q042310.1130

ANALYST: JLN

Efficiency: 1.06077

Supervisor: LMS *LMS 4/23/10*

Comments:

☐ Pass ☐ Fail

Well No.	A	Tube Label	Name	Ct	Calc Conc (pg/ul)	Target	IA	Comments
A1			1600 pg/ul	9.54	1435.13	-	-	
A2			1600 pg/ul	9.35	1647.58	-	-	
A3			400 pg/ul	11.29	404.01	-	-	
A4			400 pg/ul	11.14	449.60	-	-	
A5			100 pg/ul	13.31	93.82	-	-	
A6			100 pg/ul	13.21	100.91	-	-	
A7			25 pg/ul	15.25	23.06	-	-	
A8			25 pg/ul	15.13	25.23	-	-	
B1			6.25 pg/ul	17.12	5.99	-	-	
B2			6.25 pg/ul	16.84	7.33	-	-	
B3			1.56 pg/ul	18.92	1.62	-	-	
B4			1.56 pg/ul	18.98	1.56	-	-	
B5			0.39 pg/ul	21	0.36	-	-	
B7			0 pg/ul		0.00	-	-	pass
B8			calibrator a 250 pg/ul	12.02	237.96	-	-	pass
C1			calibrator b 250 pg/ul	12.27	199.05	-	-	pass
C2			calibrator c 250 pg/ul	12.06	231.71	-	-	pass
C3			Extraction negative 1_042310.0600		0.00	-	-	
C4			FB10-S0383 (s) FT_dup,0.1	13.26	97.05	5/16/10	X	
C5			FB10-S0384 (s) DS_dup,0.1	13.25	97.76	5/16/10	X	
C6			FB10-S0385 (s) ECU_dup,0.1	12.96	121.13	5/16/10	X	
C7			FB10-02377 (e) MC_dup,0.1	14.04	55.35	5/12/10	JSK	
C8			FB10-02377 (e) DA_dup,0.1	12.18	213.27	5/12/10	JSK	
D1			FB10-02302 (e) JB_dup,0.1	14.28	46.73	6/8/10	BAN	
D2			FB10-01511 (e) JD_dup,0.1	11.94	253.30	5/8/10	LAM	
D3			FB10-02405 (e) NB_dup,0.1	12.23	204.73	6/12/10	JSL	
D4			FB09-01468 (e) GB_dup,0.1	13.11	108.89	5/20/10	LH	
D5			FB10-01780 (e) NP_dup,0.1	13.35	91.49	5/16/10	YCO	
D6			FB10-01279 (e) GC_dup,0.1	12.29	196.45	5/8/10	YCO	
D7			FB10-S0388 (s) SF_dup,0.1	10.22	877.95	5/19/10	X	
D8			FB10-S0389 (s) PD_dup,0.1	10.86	553.97	5/19/10	X	
E1			FB10-S0387 (s) ER_dup,0.1	10.44	750.25	5/19/10	X	
E2			FB10-S0392 (s) VW_dup,0.1	9.86	1139.46	5/19/10	X	RQ
E3			FB10-S0394 (s) FD_dup,0.1	11.86	267.11	5/20/10	X	

Comments: RQ = Samples that require requantitation
 * = Sample exhibits background fluorescence
 ** = Sample exhibits low background fluorescence
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 M = Submitted to Auto-Microcon

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*FB07-80596
N4*

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A000398

A588

WMS

Run Name: RG8Q042310.0945

APPROVED BY:
Eugene Lion

ANALYST: RMM

PAGE:
1 of 1

[illegible]

Comments: RQ = Samples that require requantitation
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 ** = Sample exhibits low background fluorescence
 Δ = Sample quantitation inhibited
 A = Distribute to analyst
 M = Submitted to Auto-Microcon

N4

19

A000399

A589

Forensic Biology- ROTORGENE DATA COLLECTION

DATE APPROVED:
1/4/2010

APPROVED BY:
Eugene Lien

PAGE:
1 of 1

Run Name: RG8Q042310.0945

ANALYST: RMM

Efficiency: 1.04673

Supervisor: LMS LMS 4/23/10

Comments:

Pass

Fail

Well No.	A	Tube Label	Name	Ct	Calc Conc (pg/ul)	Target	IA	Comments
A1			1600 pg/ul	10.46	1609.19	-	-	
A2			1600 pg/ul	10.36	1725.95	-	-	
A3			400 pg/ul	12.38	408.21	-	-	
A4			400 pg/ul	12.32	425.79	-	-	
A5			100 pg/ul	14.4	95.99	-	-	
A6			100 pg/ul	14.27	104.84	-	-	
A7			25 pg/ul	16.17	26.85	-	-	
A8			25 pg/ul	16.35	23.73	-	-	
B1			6.25 pg/ul	18.98	3.59	-	-	
B2			6.25 pg/ul	18	7.28	-	-	
B3			1.56 pg/ul	20.21	1.49	-	-	
B4			1.56 pg/ul	20.34	1.36	-	-	
B5			0.39 pg/ul	21.5	0.59	-	-	
B6			0.39 pg/ul	22.12	0.38	-	-	
B7			0 pg/ul		0.00	-	-	pass
B8			calibrator a 250 pg/ul	13.35	203.26	-	-	pass
C1			calibrator b 250 pg/ul	13.08	245.95	-	-	pass
C2			calibrator c 250 pg/ul	13.27	214.79	-	-	pass
C3			Microcon_Negative_Control_042110.1045		0.00	-	-	
C4			Negative_control_1_041210.1600_mcon		0.00	-	-	
C5			FB07-03254_Femur_PM4-2_unk_mcon	22.28	0.34	5/12/10	SME	*
C6			FB07-03254_Femur_PM4-2_unk_mcon,0.1	21.9	0.44	5/12/10	SME	**
C7			Extraction_negative_1_042210.1030		0.00	-	-	
C8			FB10-S0382_cig_butt_1_submitted_for_(s)_SB	15.12	57.35	5/16/10	X	*
D1			FB10-S0382_cig_butt_1_submitted_for_(s)_SB,0.01	20.84	0.95	5/16/10	X	
D2			FB10-S0382_cig_butt_2_submitted_for_(s)_SB	16.4	22.85	5/16/10	X	*
D3			FB10-S0382_cig_butt_2_submitted_for_(s)_SB,0.01	21.87	0.45	5/16/10	X	
D4			FB10-S0386_cup_submitted_for_(s)_JF	18.44	5.32	5/17/10	X	
D5			FB10-S0386_cup_submitted_for_(s)_JF,0.01	24.71	0.06	5/17/10	X	
D6			FB10-S0386_straw_submitted_for_(s)_JF	16.05	29.31	5/17/10	X	
D7			FB10-S0386_straw_submitted_for_(s)_JF,0.01	22.27	0.34	5/17/10	X	
D8			FB10-S0391_bottle_submitted_for_(s)_RA	15.21	53.75	5/19/10	X	
E1			FB10-S0391_bottle_submitted_for_(s)_RA,0.01	21.9	0.45	5/19/10	X	
E2			Extraction_negative_1_042210.1100		0.00	-	-	

Comments: RQ = Samples that require requantitation

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** = Sample exhibits low background fluorescence

Δ = Sample quantitation inhibited

A = Distribute to analyst

M = Submitted to Auto-Microcon

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FB07-030596
NY

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A000400

A590

ID28 PROFILE GENERATION TABLE

Sample description	D0S1179	D21511	D73620	CSF1190	D3S1356	TH01	D1S3317	D1S6339	D2S1338	D1S9433	VMA	TPOX	D1S551	AMEL	DSS118	FGA
05-FB10-S0383_(s)_F1_dup	12, 13	33.2, 34.2	10, 11	12	16	7, 9, 3	11, 13	9, 13	20	13	18	8, 11	16	X, Y	11, 14	20, 24
06-FB10-S0384_(s)_DS_dup	13, 15	30, 31.2	11, 12	10	12, 18	9, 3	8, 13	12	16, 17	13, 2	15, 16	8	12, 18	X, Y	12, 13	22, 26
07-FB10-S0385_(s)_ECU_dup	13, 15	30	10, 12	10, 12	16, 17	7	10, 11	10, 12	20, 25	13, 14	17, 18	8	13, 16	X, Y	12, 13	21, 25
08-FB10-02377_(e)_MC_dup	14, 15	28, 31	9, 11	10, 12	16	6, 8	12	10, 14	19, 20	11, 12	16	8, 9	13, 15	X, Y	11, 12	23, 24
09-FB10-02377_(e)_DA_dup	12, 18	30, 32.2	8	11	15	6, 7	11, 12	8, 11	20, 21	12, 13	16, 19	8, 9	15, 17	X, Y	11, 12	21, 24
10-FB10-02302_(e)_JB_dup	10, 14	31.2	10, 12	11, 12	16, 19	6, 9, 3	11, 12	12, 13	17, 23	13, 2, 14	16, 17	8, 11	14, 20	X, Y	11, 12	20, 25
11-FB10-01511_(e)_JD_dup	13, 14	30, 33.2	10, 11	9, 11	16, 17	7, 9, 3	9, 13	9, 12	19, 20	13, 2, 14	16, 17	8, 12	16	X, Y	11	22, 25
12-FB10-02405_(e)_NB_dup	14	28, 29	9, 10	10, 12	16, 17	7, 8	11, 12	11, 12	21, 22	12, 13, 2	14, 17	8	13, 19	X	12, 13	19, 21
13-FB09-01468_(e)_GB_dup	11, 14	29, 31.2	10, 11	11, 12	14, 15	6, 8	11	13, 14	20, 25	13, 14, 2	15, 17	8, 11	11, 15	X, Y	11	22, 25
14-FB10-01780_(e)_NP_dup	12, 14	29, 32	10, 11	10, 12	16	8, 10	8, 11	11, 12	18, 25	13, 2, 14, 2	16, 19	8	14, 15	X, Y	10, 12	23, 24
15-FB10-01279_(e)_GC_dup	15	28, 31.2	8, 11	11, 12	17	8, 9, 3	12, 13	9, 12	18, 21	14, 17, 2	16, 19	11	16, 19	X, Y	13	24
16-FB10-S0386_(s)_SF_dup	14	29, 30.2	8, 10	11, 12	13, 15	8	13, 14	10, 11	24, 25	12, 2, 13	16, 19	9, 11	14, 16	X, Y	12	24, 26
18-FB10-S0389_(s)_PD_dup	13, 14	28, 30	8, 9	12	17, 18	7	10, 13	8, 13	21, 23	11, 16, 2	14, 17	8, 11	18, 21	X, Y	11, 13	19, 24
19-FB10-S0387_(s)_ER_dup	13	30, 31.2	8, 11	10, 11	15	9, 9, 3	11, 12	12	16, 20	13, 14	16	8, 11	12, 16	X, Y	11, 12	20, 21
20-FB10-S0394_(s)_FD_dup	12, 15	28, 30	9, 12	10, 12	16, 17	7, 9	12	11, 12	21, 25	13, 14	16, 18	7, 8	17, 19	X, Y	12, 13	23, 24
21-FB10-S0395_(s)_FJ_dup	14	28, 31	10, 12	7, 11	15, 16	6, 7	11, 14	10	18, 22	13, 2, 14	16, 18	8, 10	17, 20	X	11, 13	22
22-FB10-S0397_(s)_ES_dup	13, 15	29, 31.2	9	10, 12	18, 17	7, 9	11, 14	10, 12	16, 17	12, 13	16	8, 9	15, 17	X, Y	11, 12	21, 22
23-FB10-02262_(e)_BK_dup	13, 14	30, 31	12	12	15, 16	6, 7	8, 12	11, 14	17, 20	12, 16, 2	16, 17	8, 9	15, 16	X, Y	11, 13	20, 23
24-FB10-02280_(e)_ES_dup	12, 14	28, 31	11	10, 11	15	7	11, 12	10, 12	16, 20	14, 16	16	8	15, 16	X	12	25, 28
25-FB10-02305_(e)_CC_dup	11, 13	28, 30	10, 12	11	15	9, 3	10, 12	8, 13	16, 17	15, 2	14, 17	8, 10	16	X	11	21, 22
26-FB07-S0506_(s)_XW_dup	12, 17	30, 35	10	11	14, 16	6	11, 12	9, 13	18, 22	13, 15, 2	16, 18	6, 8	14, 17	X, Y	12, 13	20, 21
28-FB00-1840_Muscle_P911-4.unk	13, 15	29, 30.2	10, 12	10, 12	16	6, 7	10, 12	9	18, 20	13, 14	18	8, 12	13, 17	X	9, 12	23, 25

A591
A000401

17

307
4/2/2010

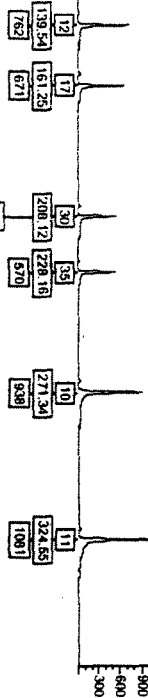
1601

ABI
PRISM

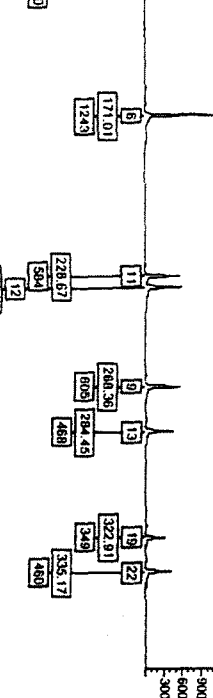
Pics - Rudy 10-0551D_jia.gia
Licensed to OCME, OCME

12:14:50 PM Sat, Apr 24, 2010
Genotype 3.7

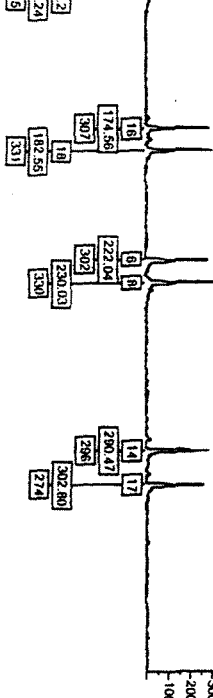
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26-FB07-S0596_(s) ... 4 lba 4 Green 26-FB07-S0596_(s)_KW_dup



26-FB07-S0596_(s) ... 4 lba 4 Yellow 26-FB07-S0596_(s)_KW_dup



For Forensic and Research Use Only

NH

2/21/10

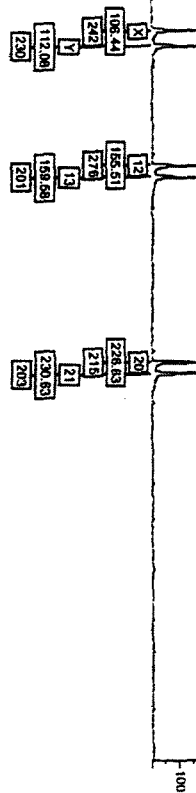
Not for use in Diagnostic Procedures.

ABI
PRISM

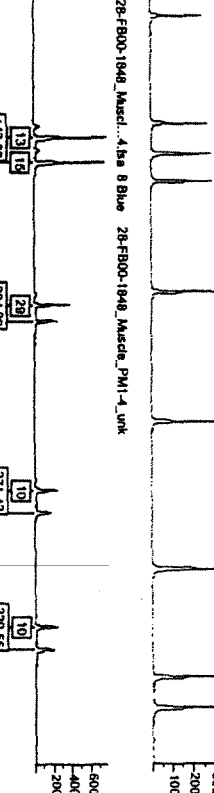
Pics - Rudy 10-0551D_jia.gia
Licensed to OCME, OCME

12:14:51 PM Sat, Apr 24, 2010
Genotype 3.7

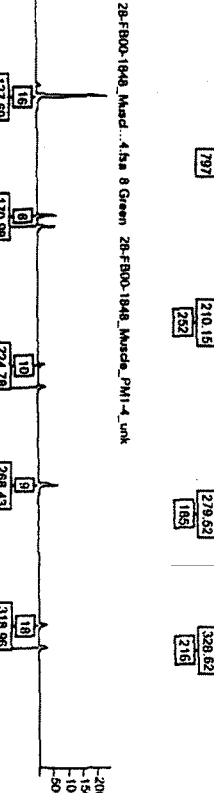
26-FB07-S0596_(s) ... 4 lba 4 Red 26-FB07-S0596_(s)_KW_dup



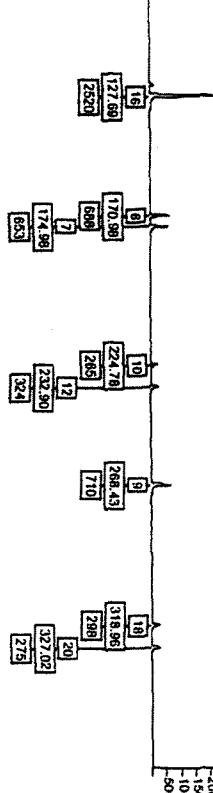
26-FB07-S0596_(s) ... 4 lba 4 Orange 26-FB07-S0596_(s)_KW_dup



26-FB00-1848_Mascl... 4 lba 8 Blue 26-FB00-1848_Mascl_PMI-4_unk



26-FB00-1848_Mascl... 4 lba 8 Green 26-FB00-1848_Mascl_PMI-4_unk



For Forensic and Research Use Only

2/21/10

Not for use in Diagnostic Procedures.

Forensic Biology - STR 3130xl Control Review Worksheet

DATE EFFECTIVE	APPROVED BY	PAGE
3/3/2010	Eugene Lien	1 of 1

Run Name: Rudy10-0551D

Analyst: WJA

Date: 04/24/10

EN Database Entry : ☒ N/A: ☐

Reviewer: AI

Date: 4/24/10

EN Database Check : ☒ N/A: ☐

Control Type	Date and time	Pass or Fail	Comment	Resolution
Allelic Ladder	N/A	Pass		
Positive Control	042310.1530	Pass		
Amplification Negative	042310.1530	Pass		
Extraction Negative 1 ____	042310.0800	Pass		
Extraction Negative 1 ____	042110.1550	Pass		

Page 1 of 1

14

FB07-S0596 NY

A000404

A594

Forensic Biology - 3130xl Capillary Electrophoresis Sample Sheet

DATE EFFECTIVE 4/7/2010	APPROVED BY Eugene Lien	PAGE 1 of 1
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SAMPLE SHEET: Rudy10-0551D

Prepared by: JOA

Run Set Up: JOA

ID AL: 0812015

POP4: 1002005

Plate set up: JOA

Witness: Cmk

PPY AL: N/A

HIDI: 0904818

Buffer: 10023-46

Date: 04/24/10

LIZ 500: 0904105

ILS 600: N/A

Run Folders: 2010-04-24-0032 to 2010-04-24-0033

Comments:

Original run filed with: Rudy10-0551D

Rerun Legend: # = bad size std, Δ = to confirm off ladder, dil = rerun at a dilution

Well	Sample	Tube Label	Case Number-Description	SYS	TYPE	IA	Comments
A1	01-	AL1	Allelic Ladder 1	I	AL	-	
B1	02-	PCR	Positive control 042310.1530	I	PC	-	
C1	03-	ANR	Amplification negative 042310.1530	I	NC	-	
D1	04-	ENR1	Extraction negative 1 042310.0800	I	NC	-	
E1	05-	3FTd	FB10-S0383 (s) FT_dup	I	S	X	
F1	06-	4DSd	FB10-S0384 (s) DS_dup	I	S	X	
G1	07-	ECUd	FB10-S0385 (s) ECU_dup	I	S	X	
H1	08-	7MCd	FB10-02377 (e) MC_dup	I	S	JSK	
A2	09-	7DAd	FB10-02377 (e) DA_dup	I	S	JSK	
B2	10-	2JBd	FB10-02302 (e) JB_dup	I	S	BAN	
C2	11-	1JDd	FB10-01511 (e) JD_dup	I	S	LAM	
D2	12-	5NBd	FB10-02405 (e) NB_dup	I	S	JSL	
E2	13-	8GBd	FB09-01468 (e) GB_dup	I	S	LH	
F2	14-	0NPd	FB10-01780 (e) NP_dup	I	S	YCO	
G2	15-	9GCd	FB10-01279 (e) GC_dup	I	S	YCO	
H2	16-	8SFd	FB10-S0388 (s) SF_dup	I	S	X	
A3	17-	AL2	Allelic Ladder 2	I	AL	-	
B3	18-	9PDd	FB10-S0389 (s) PD_dup	I	S	X	
C3	19-	7ERd	FB10-S0387 (s) ER_dup	I	S	X	
D3	20-	4FDd	FB10-S0394 (s) FD_dup	I	S	X	
E3	21-	5FJd	FB10-S0395 (s) FJ_dup	I	S	X	
F3	22-	7ESd	FB10-S0397 (s) ES_dup	I	S	X	
G3	23-	2BKd	FB10-02262 (e) BK_dup	I	S	LNB	
H3	24-	0ESd	FB10-02280 (e) ES_dup	I	S	LNB	
A4	25-	5CCd	FB10-02395 (e) CC_dup	I	S	BAN	
B4	26-	6KWd	FB07-S0596 (s) KW_dup	I	S	X	
C4	27-	ENR2	Extraction negative 1 042110.1550	I	NC	-	
D4	28-	48u4	FB00-1848 Muscle PM1-4 unk	I	S	BMA	
E4	29-						
F4	30-						
G4	31-						
H4	32-						
A5	33-						
B5	34-						
C5	35-						
D5	36-						
E5	37-						
F5	38-						
G5	39-						
H5	40-						
A6	41-						
B6	42-						
C6	43-						
D6	44-						
E6	45-						
F6	46-						
G6	47-						
H6	48-						

Forensic Biology - Identifier 28 Amplification Sheet - EXEMPLARS

DATE EFFECTIVE 4/8/2010	APPROVED BY Eugene Lien	PAGE 1 of 1
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Amp:	042310.1530
Sample #	26
TC#	714C-TC5
3130 Run:	Rudy 10-05510

Reviewer: LMS /MS
Analyst: RMM Rmmu/23110
Witness: JP

Reagent	Lot No	n=1	n=?
ID primers	0909070	2.5	72
Reaction Mixture	0906145	5.0	143
ABI Taq Gold	MP3304	0.5	14.3
master mix total	---	8.0	229
Stratalinked water	98	-	-
ABI Pos Cont 100pg/μL	0906027	5 μl of 1/2 dil	

Label	Sample Description	pg/μl	dil	DNA	H2O	IA
PCR	Positive control 042310.1530	100.00	0.50	5.0	0.0	-
ANR	Amplification negative 042310.1530	0.00	1.00	0.0	5.0	-
ENR1	Extraction negative 1 042310.0800	0.00	1.00	5.0	0.0	-
3FTd	FB10-S0383 (s) FT_dup	970.50	0.2	2.6	2.4	X
4DSd	FB10-S0384 (s) DS_dup	977.60	0.2	2.6	2.4	X
ECUd	FB10-S0385 (s) ECU_dup	1211.30	0.2	2.1	2.9	X
7MCd	FB10-02377 (e) MC_dup	553.50	0.25	3.6	1.4	JSK
7DAd	FB10-02377 (e) DA_dup	2132.70	0.2	1.2	3.8	JSK
2JBd	FB10-02302 (e) JB_dup	467.30	1.00	1.1	3.9	BAN
1JDd	FB10-01511 (e) JD_dup	2533.00	0.05	3.9	1.1	LAM
5NBd	FB10-02405 (e) NB_dup	2047.30	0.2	1.2	3.8	JSL
8GBd	FB09-01468 (e) GB_dup	1088.90	0.2	2.3	2.7	LH
0NPd	FB10-01780 (e) NP_dup	914.90	0.2	2.7	2.3	YCO
9GCD	FB10-01279 (e) GC_dup	1964.50	0.2	1.3	3.7	YCO
8SFd	FB10-S0388 (s) SF_dup	8779.50	0.05	1.1	3.9	X
9PDd	FB10-S0389 (s) PD_dup	5539.70	0.05	1.8	3.2	X
7ERd	FB10-S0387 (s) ER_dup	7502.50	0.05	1.3	3.7	X
4FDd	FB10-S0394 (s) FD_dup	2671.10	0.05	3.7	1.3	X
5FJd	FB10-S0395 (s) FJ_dup	3728.40	0.05	2.7	2.3	X
7ESd	FB10-S0397 (s) ES_dup	288.20	1.00	1.7	3.3	X
2BKd	FB10-02262 (e) BK_dup	1133.90	0.2	2.2	2.8	LNB
0ESd	FB10-02280 (e) ES_dup	609.00	0.25	3.3	1.7	LNB
5CCd	FB10-02395 (e) CC_dup	1018.20	0.2	2.5	2.5	BAN
6KWd	FB07-S0596 (s) KW_dup	2329.30	0.2	1.1	3.9	X
ENR2	Extraction negative 1 042110.1550	0.00	1.00	5.0	0.0	-
48u4	FB00-1848 Muscle PM1-4_unk	641.14	0.2	3.9	1.1	BMA

* eneg run separately

12

N4

A000406

A596

**FORENSIC BIOLOGY - M48 EXTRACTION WORKSHEET - buccal specimens and known
bloodstains - EXEMPLARS**

DATE EFFECTIVE:
11/02/2009

APPROVED BY
Eugene Lien

PAGE
1 of 1

Buffer G2 133193749
 QIAGEN Proteinase K 133191234
 Sterile Water 182
 Ethanol (100%) Y4497
 Buffer MW1 133193005

Buffer MTL 133192625
 Buffer MW2 133192841
 TE⁻ 110
 MagAttract Suspension B 133192022

Sample Rack Position	Tube Label	Case number-sample description	Target Date	IA
1	Neg1	Extraction negative 1 042310.0800	-	-
2	Neg2	Extraction negative 2 042310.0800	-	-
3	3FTd	FB10-S0383 (s) FT dup	5/16/2010	X
4	4DSd	FB10-S0384 (s) DS dup	5/16/2010	X
5	5ECUd	FB10-S0385 (s) ECU dup	05/16/10	X
6	7MCd	FB10-02377 (e) MC dup	5/12/2010	JSK
7	7DA d	FB10-02377 (e) DA dup	5/12/2010	JSK
8	2JBd	FB10-02302 (e) JB dup	6/8/2010	BAN
9	1JDd	FB10-01511 (e) JD dup	5/8/2010	LAM
10	5NBd	FB10-02405 (e) NB dup	6/12/2010	JSL
11	8GBd	FB09-01468 (e) GB dup	5/20/2010	LH
12	0NPD	FB10-01780 (e) NP dup	5/16/2010	YCO
13	9GCd	FB10-01279 (e) GC dup	5/8/2010	YCO
14	8SFd	FB10-S0388 (s) SF dup	05/19/10	X
15	9PDd	FB10-S0389 (s) PD dup	05/19/10	X
16	7ERd	FB10-S0387 (s) ER dup	05/19/10	X
17	2VWd	FB10-S0392 (s) VW dup	05/19/10	X
18	4FDd	FB10-S0394 (s) FD dup	05/20/10	X
19	5FJd	FB10-S0395 (s) FJ dup	05/20/10	X
20	7ESd	FB10-S0397 (s) ES dup	05/20/10	X
21	2BKd	FB10-02262 (e) BK dup	5/6/2010	LNB
22	0ESd	FB10-02280 (e) ES dup	5/7/2010	LNB
23	5CCd	FB10-02395 (e) CC dup	6/12/2010	BAN
24	6KWd	FB07-S0596 (s) KW dup	5/22/2010	X

Performed by: STC Date: 4/23/10 Time: 08:46

Tube Witnesses: Incubation Rmm

Extraction Set: Date: 4/23/10 Time: 08:00

Robot Set-Up Rmm

Sample in Cryobox: E7031

E704 NY

11

A000407

A597

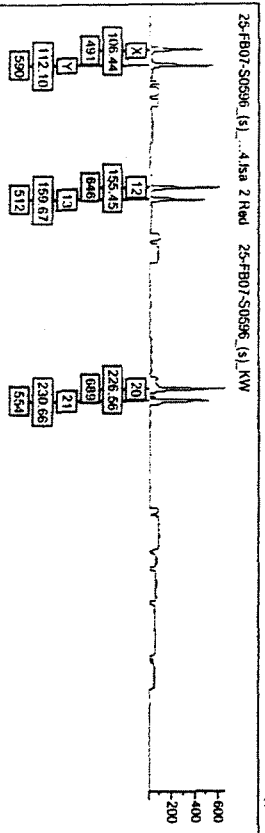
ID28 PROFILE GENERATION TABLE

Stripes 10-06010 (1a)	Sample description	D8S1179	D21S11	D7S820	CSF1P0	D3S1368	TH01	D1S3317	D1S5S39	D281328	D1S6433	VMA	TPOX	D1S5S1	AMEL	D5S818	FGA
05-FBI0-01723_Sistem1A1-1_VS		10, 13	31, 31.2	8, 10	10, 11	16, 17	7, 8	12	12	19, 24	14.2, 15	16, 18	8, 11	16, 19	X	12	21, 22
06-FBI0-02377_(9)_MC		14, 15	28, 31	8, 11	10, 12	16	6, 8	12	10, 14	18, 20	11, 12	16	8, 9	13, 16	X, Y	11, 12	23, 24
07-FBI0-02377_(9)_DA		12, 18	30, 32.2	8	11	16	6, 7	11, 12	8, 11	20, 21	12.2, 13	15, 19	8, 9	16, 17	X, Y	11, 12	21, 24
08-FBI0-02302_(9)_JB		10, 14	31.2	10, 12	11, 12	16, 19	6, 9.3	11, 12	12, 13	17, 23	13.2, 14	16, 17	8, 11	14, 20	X, Y	11, 12	20, 25
09-FBI0-02404_(9)_DL		13, 14	31.2, 30.2	12, 13	12	16, 16	9, 9.3	8, 11	11, 13	18	13, 14.2	17	8	14, 16	X, Y	10, 12	19, 21
10-FBI0-01622_(9)_S2		11, 15	33.2	11	12, 14	15, 16	7, 9	8, 9	9, 10	18, 23	14, 16	17	8, 9	12, 16	X, Y	10, 12	23, 26
11-FBI0-02118_(9)_RW		10, 16	31, 33.2	8, 10	10, 12	16, 17	6, 7	11, 12	11	18, 22	12.2, 14	19	10, 11	11, 16	X, Y	8, 11	24
12-FBI0-01511_(9)_JD		13, 14	30, 33.2	10, 11	8, 11	16, 17	7, 8.3	9, 13	9, 12	18, 20	13.2, 14	18, 17	8, 12	16	X, Y	11	22, 25
13-FBI0-02095_(9)_MC		13, 16	29, 33.2	11, 12	10	16, 16	8, 9	8, 12	13	17, 23	13, 16.2	14, 19	8, 11	15, 19	X, Y	11, 12	21, 26
14-FBI0-02405_(9)_NB		14	28, 29	9, 10	10, 12	16, 17	7, 8	11, 12	11, 12	21, 22	12, 13.2	14, 17	8	13, 19	X	12, 13	19.2, 21
15-FBI0-S0388_(9)_SF		14	29, 30.2	8, 10	11, 12	13, 15	8	13, 14	10, 11	24, 25	12.2, 13	16, 19	9, 11	14, 16	X, Y	12	24, 26
16-FBI0-S0389_(9)_PD		13, 14	28, 30	8, 9	12	17, 18	7	10, 13	9, 13	21, 23	11, 16.2	14, 17	8, 11	18, 21	X, Y	11, 13	19, 24
18-FBI0-S0387_(9)_ER		13	30, 31.2	8, 11	10, 11	16	9, 9.3	11, 12	12	16, 20	13, 14	16	8, 11	12, 16	X, Y	11, 12	20, 21
19-FBI0-S0386_(9)_FJ																	
20-FBI0-S0387_(9)_ES																	
21-FBI0-S0384_(9)_FD		12, 15	28, 30	9, 12	10, 12	16, 17	7, 9	12	11, 12	21, 26	13, 14	16, 16	7, 8	17, 19	X, Y	12, 13	23, 24
22-FBI0-02273_(9)_SH		11, 14	24.2, 28	10	10, 12	15, 16	7, 9	11, 12	11	16, 19	12, 16.2	14, 15	9, 11	10, 16	X	8, 11	23, 24
23-FBI0-02262_(9)_BK		13, 14	30, 31	12	12	15, 16	6, 7	8, 12	11, 14	17, 20	12, 16.2	16, 17	8, 9	15, 18	X, Y	11, 13	20, 23
24-FBI0-02280_(9)_ES		12, 14	29, 31	11	10, 11	16	7	11, 12	10, 12	18, 20	14, 16	16	8	16, 16	X	12	26, 28
26-FBI0-S0386_(9)_KW		12, 17	30, 36	10	11	14, 15	8	11, 12	9, 13	19, 22	13, 16.2	16, 18	6, 8	14, 17	X, Y	12, 13	20, 21
27-FBI0-S0382 CG Unit 1 submitted for (9) SB		11, 16										16			X, Y		
28-FBI0-S0382 CG Unit 2 submitted for (9) SB		11, 16													X, Y		
29-FBI0-S0386 screw submitted for (9) JF		13, 15	30, 30.2	9, 10	12, 13	16, 16	6	11, 12	11	17, 25	16, 16.2	16, 19	10, 11	14, 16	X, Y	11, 12	23, 25
30-FBI0-S0391 bottle submitted for (9) RA		13, 15	30.2, 33.2	10, 13	11, 12	14	6, 7	12, 13	9, 10	20, 24	13	17	8, 11	15, 20	X, Y	10, 11	19, 26
32-FBI0-02314_POC_1A		13, 16	28, 31	9, 11	8, 10	16, 19	9, 9.3	11, 12	10, 12	19, 21	13	16	10, 11	16, 17	X	8, 13	21, 22

A598
A000408

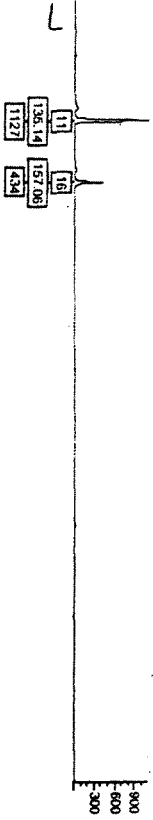
10

10A
N4



25-FB07-S0596 (s) KW

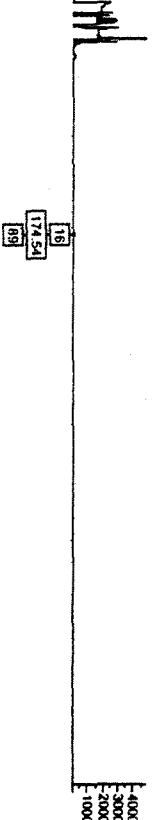
27-FB10-S0382 (s) SB



27-FB10-S0382 (s) SB

No Size Data

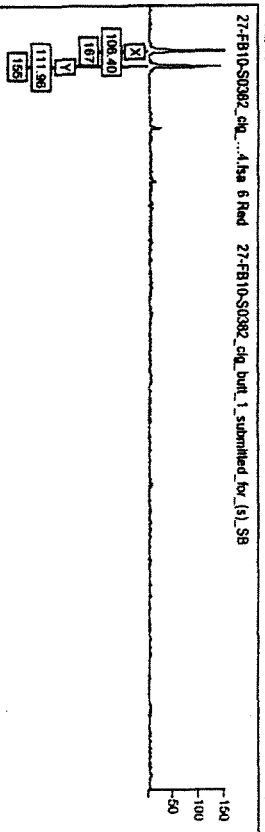
27-FB10-S0382 (s) SB



For Forensic and Research Use Only

-25-

Not for use in Diagnostic Procedures.



27-FB10-S0382 (s) SB

28-FB10-S0382 (s) SB



28-FB10-S0382 (s) SB

No Size Data

28-FB10-S0382 (s) SB

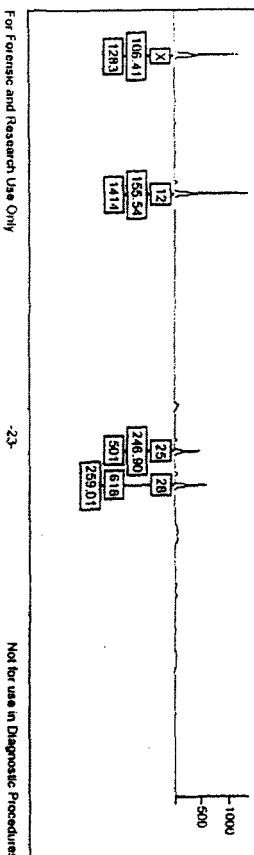
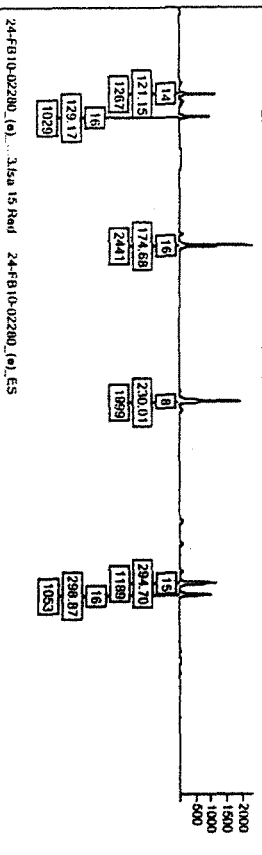
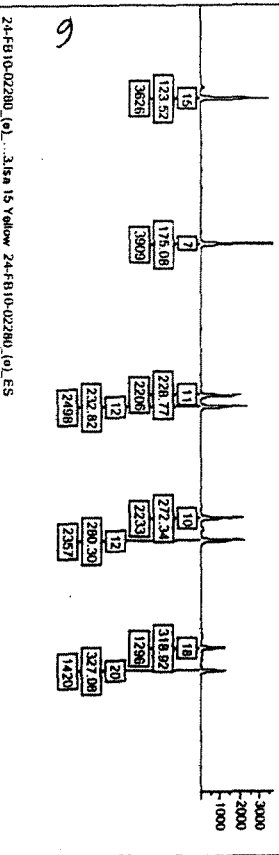
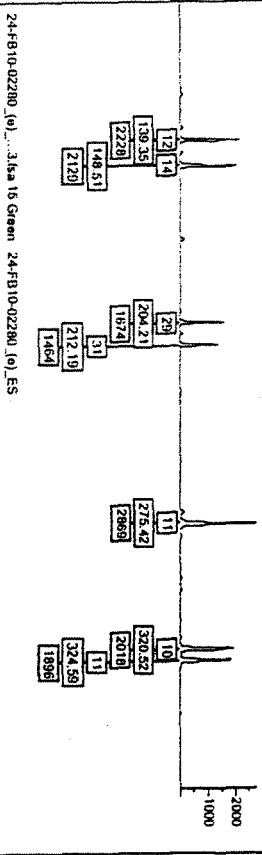
No Size Data

For Forensic and Research Use Only

-26-

Not for use in Diagnostic Procedures.

24-FB10-02280_(e)....3.ksa 15 Blue 24-FB10-02280_(e)_ES

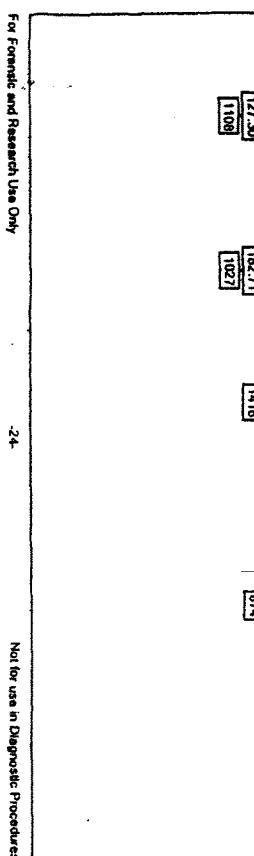
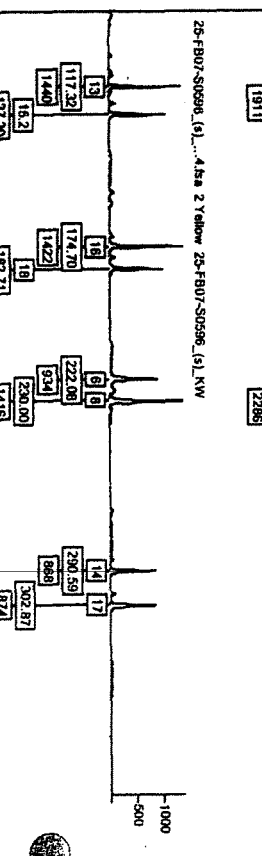
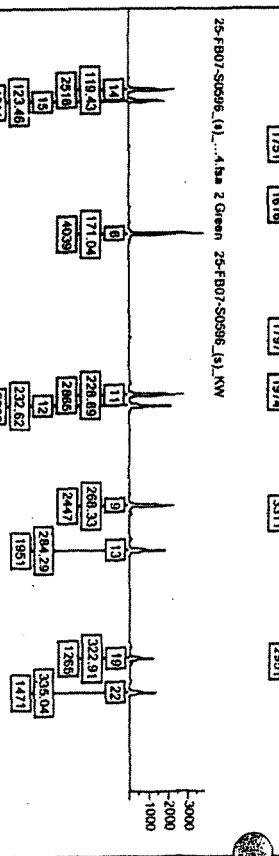
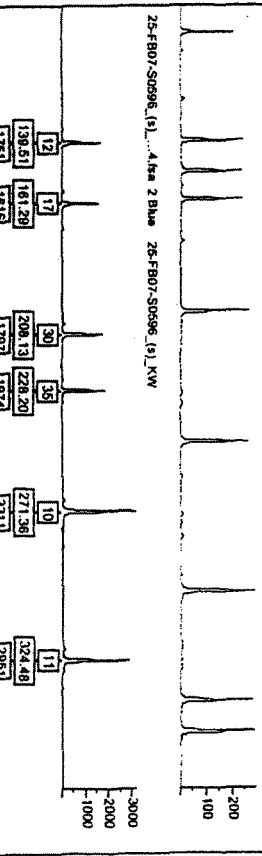


For Forensic and Research Use Only

-23-

Not for use in Diagnostic Procedures.

24-FB10-02280_(e)....3.ksa 15 Orange 24-FB10-02280_(e)_ES



For Forensic and Research Use Only

-24-

Not for use in Diagnostic Procedures.

Forensic Biology - STR 3130xl Control Review Worksheet

DATE EFFECTIVE	APPROVED BY	PAGE
3/3/2010	Eugene Lien	1 of 1

Run Name: Stripes10-0601D

Analyst: JOA

Date: 04/24/10

EN Database Entry: ☒ N/A: ☐

Reviewer: AJ

Date: 4/24/10

EN Database Check: ☒ N/A: ☐

Control Type	Date and time	Pass or Fail	Comment	Resolution
Allelic Ladder	N/A	Pass		
Positive Control	042310.1245	Pass		
Amplification Negative	042310.1245	Pass		
Extraction Negative 1 ____	042210.1445	Pass		
Extraction Negative 1 ____	042210.1030	Pass		
Extraction Negative 1 ____	042210.1100	Pass		

Page 1 of 1

5

FB07-50596

N7

A000413

A603

Forensic Biology - 3130xl Capillary Electrophoresis Sample Sheet

DATE EFFECTIVE 4/7/2010	APPROVED BY Eugene Lien	PAGE 1 of 1
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SAMPLE SHEET: Stripes10-0601D

ID AL: 0812015

POP4: 1002065

Prepared by: JDA

Run Set Up: JDA

PPY AL: N/A

HID: 904818

Plate set up: JDA

Witness: CMK

LIZ 500: 0904105

ILS 600: N/A

Buffer: 1002346

Date: 04/24/10

Run Folders: 2010-04-24-0601D to 2010-04-24-0601D

Comments:

Original run filed with: Stripes10-0601D

Rerun Legend: # = bad size std, Δ = to confirm off ladder, dil = rerun at a dilution

Well	Sample	Tube Label	Case Number-Description	SYS	TYPE	IA	Comments
A1	01-	AL1	Allelic Ladder 1	I	AL	-	
B1	02-	PCJ	Positive control 042310.1245	I	PC	-	
C1	03-	ANJ	Amplification negative 042310.1245	I	NC	-	
D1	04-	ENJ1	Extraction negative 1 042210.1445	I	NC	-	
E1	05-	3VS	FB10-01723 Sister1A1-1 VS	I	S	BMA	
F1	06-	7MC	FB10-02377 (e) MC	I	S	JSK	
G1	07-	7DA	FB10-02377 (e) DA	I	S	JSK	
H1	08-	2JB	FB10-02302 (e) JB	I	S	BAN	
A2	09-	4DL	FB10-02404 (v) DL	I	S	CAG	
B2	10-	2SZ	FB10-01622 (v) SZ	I	S	jdb	
C2	11-	8RW	FB10-02118 (v) RW	I	S	MWM	
D2	12-	1JD	FB10-01511 (e) JD	I	S	LAM	
E2	13-	5MC	FB10-02095 (v) MC	I	S	YMZ	
F2	14-	5NB	FB10-02405 (e) NB	I	S	JSL	
G2	15-	8SF	FB10-S0388 (s) SF	I	S	X	
H2	16-	9PD	FB10-S0389 (s) PD	I	S	X	
A3	17-	AL2	Allelic Ladder 2	I	AL	-	
B3	18-	7ER	FB10-S0387 (s) ER	I	S	X	
C3	19-	5FJ	FB10-S0395 (s) FJ	I	S	X	
D3	20-	7ES	FB10-S0397 (s) ES	I	S	X	
E3	21-	4FD	FB10-S0394 (s) FD	I	S	X	
F3	22-	3SH	FB10-02273 (v) SH	I	S	AMN	
G3	23-	2BK	FB10-02262 (e) BK	I	S	LNB	
H3	24-	0ES	FB10-02280 (e) ES	I	S	LNB	
A4	25-	6KW	FB07-S0596 (s) KW	I	S	X	
B4	26-	ENJ2	Extraction negative 1 042210.1030	I	NC	-	
C4	27-	21SB	FB10-S0382 cig butt 1 submitted for (s) SB	I	S	X	
D4	28-	22SB	FB10-S0382 cig butt 2 submitted for (s) SB	I	S	X	
E4	29-	6JF	FB10-S0386 straw submitted for (s) JF	I	S	X	
F4	30-	1RA	FB10-S0391 bottle submitted for (s) RA	I	S	X	
G4	31-	ENJ3	Extraction negative 1 042210.1100	I	NC	-	
H4	32-	14A	FB10-02314_POC_1A	I	S	BMA	
A5	33-						
B5	34-						
C5	35-						
D5	36-						
E5	37-						
F5	38-						
G5	39-						
H5	40-						
A6	41-						
B6	42-						
C6	43-						
D6	44-						
E6	45-						
F6	46-						
G6	47-						
H6	48-						

Forensic Biology - Identifiler 28 Amplification Sheet - EXEMPLARS

DATE EFFECTIVE 4/8/2010	APPROVED BY Eugene Lien	PAGE 1 of 1
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Amp:	042310.1245
Sample #	30
TC#	714C-TC11
3130 Run:	Stripes10-042310

Reagent	Lot No	n=1	n=7
ID primers	0909070	2.5	83
Reaction Mixture	0906145	5.0	165
ABI Tag Gold	MP3304	0.5	16.5
master mix total	----	8.0	264
Stratalinked water	98	-	-
ABI Pos Cont 100pg/ul	0906067	5 ul of 1/2 dil	

Reviewer: LMS LMS
Analyst: JLN 04/23/10
Witness: Rmm

Label	Sample Description	pg/ul	dil	DNA	H2O	IA
PCJ	Positive control 042310.1245	100.00	0.50	5.0	0.0	-
ANJ	Amplification negative 042310.1245	0.00	1.00	0.0	5.0	-
ENJ1	Extraction negative 1 042210.1445	0.00	1.00	5.0	0.0	-
3VS	FB10-01723 Sister1A1-1 VS	4446.70	0.05	2.2	2.8	BMA
7MC	FB10-02377 (e) MC	1886.30	0.2	1.3	3.7	JSK
7DA	FB10-02377 (e) DA	3034.00	0.05	3.3	1.7	JSK
2JB	FB10-02302 (e) JB	1166.10	0.2	2.1	2.9	BAN
4DL	FB10-02404 (v) DL	7438.80	0.05	1.3	3.7	CAG
2SZ	FB10-01622 (v) SZ	2493.70	0.2	1.0	4.0	jdb
8RW	FB10-02118 (v) RW	584.30	0.25	3.4	1.6	MWM
1JD	FB10-01511 (e) JD	2249.00	0.2	1.1	3.9	LAM
5MC	FB10-02095 (v) MC	6580.40	0.05	1.5	3.5	YMZ
5NB	FB10-02405 (e) NB	2549.00	0.05	3.9	1.1	JSL
8SF	FB10-S0388 (s) SF	8941.00	0.05	1.1	3.9	X
9PD	FB10-S0389 (s) PD	7930.50	0.05	1.3	3.7	X
7ER	FB10-S0387 (s) ER	7145.60	0.05	1.4	3.6	X
5FJ	FB10-S0395 (s) FJ	3724.80	0.05	2.7	2.3	X
7ES	FB10-S0397 (s) ES	219.30	1.00	2.3	2.7	X
4FD	FB10-S0394 (s) FD	5334.70	0.05	1.9	3.1	X
3SH	FB10-02273 (v) SH	4020.70	0.05	2.5	2.5	AMN
2BK	FB10-02262 (e) BK	1936.00	0.2	1.3	3.7	LNB
0ES	FB10-02280 (e) ES	519.00	0.25	3.9	1.1	LNB
6KW	FB07-S0596 (s) KW	1564.30	0.2	1.6	3.4	X
ENJ2	Extraction negative 1 042210.1030	0.00	1.00	5.0	0.0	-
21SB	FB10-S0382 cig butt 1 submitted for (s) SB	95.00	1.00	5.0	0.0	X
22SB	FB10-S0382 cig butt 2 submitted for (s) SB	45.00	1.00	5.0	0.0	X
6JF	FB10-S0386 straw submitted for (s) JF	29.31	1.00	5.0	0.0	X
1RA	FB10-S0391 bottle submitted for (s) RA	53.75	1.00	5.0	0.0	X
ENJ3	Extraction negative 1 042210.1100	0.00	1.00	5.0	0.0	-
14A	FB10-02314 POC 1A	218700.00	0.002	1.1	3.9	BMA

* eneg run separately

**FORENSIC BIOLOGY - M48 EXTRACTION WORKSHEET - buccal specimens and known
bloodstains - EXEMPLARS**

DATE EFFECTIVE:
11/02/2009

APPROVED BY
Eugene Lien

PAGE
1 of 1

Buffer G2 133193749
 QIAGEN Proteinase K 133191234
 Sterile Water 182
 Ethanol (100%) 44497
 Buffer MW1 133193005

Buffer MTL 133192625
 Buffer MW2 133192841
 TE⁺ 110.1
 MagAttract Suspension B 133192022

Sample Rack Position	Tube Label	Case number-sample description	Target Date	IA
1	Neg1	extraction negative 1 042210.1445	-	-
2	Neg2	extraction negative 2 042210.1445	-	-
3	3VS	FB10-01723 Sister1A1-1 VS	5/14/2010	BMA
4	7MC	FB10-02377 (e) MC	5/12/2010	JSK
5	7DA	FB10-02377 (e) DA	5/12/2010	JSK
6	2JB	FB10-02302 (e) JB	6/8/2010	BAN
7	4DL	FB10-02404 (v) DL	5/12/2010	CAG
8	2SZ	FB10-01622 (v) SZ	5/12/2010	jdb
9	8RW	FB10-02118 (v) RW	6/12/2010	MWM
10	1JD	FB10-01511 (e) JD	5/8/2010	LAM
11	5MC	FB10-02095 (v) MC	5/30/2010	YMZ
12	5NB	FB10-02405 (e) NB	6/12/2010	JSL
13	8SF	FB10-S0388 (s) SF	05/19/10	X
14	9PD	FB10-S0389 (s) PD	05/19/10	X
15	2VW	FB10-S0392 (s) VW	5/19/10	X
16	7ER	FB10-S0387 (s) ER	5/19/10	X
17	5FJ	FB10-S0395 (s) FJ	5/20/10	X
18	7ES	FB10-S0397 (s) ES	5/20/10	X
19	4FD	FB10-S0394 (s) FD	5/20/10	X
20	1GR	FB10-02411 (v) GR	5/17/2010	MWM
21	3SH	FB10-02273 (v) SH	5/16/2010	AMN
22	2BK	FB10-02262 (e) BK	5/6/2010	LNB
23	0ES	FB10-02280 (e) ES	5/7/2010	LNB
24	6KW	FB07-S0596 (s) KW	5/22/2010	X

Performed by: JUN Date: 04/22/10 Time: 15:32

Tube Witnesses: Incubation GJC

Extraction Set: Date: 04/22/10 Time: 14:45

Robot Set-Up RMM

Sample in Cryobox: E703

2

N4

A000416

A606

Exemplar Evidence Packaging and Exam Worksheet- SWAB

Case FB 07-50596 Date 4/22/10 Analyst JJB
Voucher No. R361863 Subject(s) Kenneth Washington Item No(s). 1

Packaging:

<u> </u> box	approximate size	_____
<u> </u> bag	XS S M L XL XXL XXXL	_____
<u>X</u> envelope	approximate size	<u>~9" x 6"</u>
<u> </u> canister	approximate size	_____
<u> </u> paper wrapping	approximate size	_____

Package material:

X paper plastic metal cardboard glass

Package color: white

Sealed: (Y) N

Seal type: X tape label staple other (specify) _____

Package information, marks, labels, stickers, comments:

☐ - Discrepancy form submitted

Written on envelope FB07-50596, R361863... "Inside the envelope was sealed white envelope measuring ~7 1/2" x 5" Written on envelope "R361863, Kenneth Washington..."

Swab processing:

item # 1 number of oral swabs 1 itemized as 1
First cutting of item 1 by: Initials: JJB Date: 4/22/10
Second cutting of item 1 by: Initials: DB Date: 04/22/10

Pseudo processing:

item# _____	type of item _____	cutting swab scraping itemized as _____
Measurement of item _____		
Description: <u>JJB 4/22/10</u>		
item# _____	type of item _____	cutting swab scraping itemized as _____
Measurement of item _____		
Description: _____		

Item(s) _____ submitted for extraction by: Initials: _____ Date: _____

Item(s) put in retained storage: _____

Item(s) returned in original packaging to EU: _____

Comments: _____

EXEMPLAR-SWAB

A000417
A607

N4

A000418

A608

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

KENNETH WASHINGTON,

Plaintiff,

-against-

THOMAS GRIFFIN,

Defendant.

: 15-CV-00603 (FB)

:
: United States Courthouse
: Brooklyn, New York

:
: Wednesday, October 28, 2015
: 4:00 p.m.

- - - - - X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: APPELLATE ADVOCATES

111 John Street, 9th Floor
New York, New York 10038

BY: PAUL SKIP LAISURE, ESQ.

For the Defendant: QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE

125-01 Queens Boulevard
Kew Gardens, New York 11415

BY: WILLIAM H. BRANIGAN, ESQ.
Assistant District Attorney

Court Reporter:

SHERRY J. BRYANT, RMR, CRR
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Brooklyn, New York 11201
sbryant102@verizon.net

Proceedings recorded by mechanical stenography, transcript
produced by Computer-Assisted Transcript.

SHERRY BRYANT, RMR, CRR

A000419
A609

1 (In open court.)

2 COURTROOM DEPUTY: Civil cause for oral argument,
3 Washington versus Griffin. I ask counsel if you could state
4 your appearances. You may be seated.

5 MR. LAISURE: Good afternoon, Judge. Paul Skip
6 Laisure, L-a-i-s-u-r-e, with Appellate Advocates for Mr.
7 Washington.

8 MR. BRANIGAN: Good afternoon, Your Honor. William
9 Branigan, B-r-a-n-i-g-a-n, from the Queens District Attorney
10 for the respondent.

11 THE COURT: All right. And this lady in the back of
12 the courtroom, are you here on this matter?

13 MS. ZLOCZOWER: I'm just observing, Your Honor.

14 MR. LAISURE: A colleague of mine observing.

15 THE COURT: Why don't you come up here. You look
16 like you're isolated back there. There's no need to do that.
17 Have you been working on this matter with Mr. Laisure?

18 MS. ZLOCZOWER: I work in the same office as Mr.
19 Laisure, but not on this matter.

20 THE COURT: Just sit down and you'll probably be
21 able to hear us better when you're close by.

22 MS. ZLOCZOWER: Thank you.

23 THE COURT: So we have this interesting
24 confrontation issue. You folks have done a wonderful job
25 briefing it and paying attention to it. It's a textbook law

SHERRY BRYANT, RMR, CRR

A000420

A610

1 school type of problem, right? But we're going to just ask
2 you folks a few questions, and it's silly for me just to have
3 you make speeches because I don't think it makes for effective
4 argument in a matter like this, right?

5 So I'm just curious, in terms of seeing whether
6 we've covered our research properly, are there any Circuit
7 Court decisions that have directly dealt with the Washington
8 dynamic which have come out and said that being in custody is
9 the *raison d'etre* of the principal factor that we have to
10 consider in order to decide whether the Confrontation Clause
11 is implicated or not?

12 I wonder whether we have anything in addition to
13 Williams to discuss and what the Circuits have said about a
14 Washington case if it was presented like we have it here, not
15 on habeas review but on direct appeal.

16 Does anybody else out there, anybody, know any other
17 cases like this?

18 MR. BRANIGAN: Your Honor, honestly, I don't have
19 anything for you. At the time I -- at the time I did my
20 research there was nothing on point, but I know that a number
21 of federal courts have been looking at the issue. But I
22 didn't have anything that squared.

23 THE COURT: We're looking into it. I just want to
24 give the current overview, so to speak.

25 Mr. Laisure, do you have any Circuit Court

1 authority?

2 MR. LAISURE: I looked through the Second Circuit
3 cases over the last several years since we originally filed
4 this and found nothing. I found only a few district court
5 decisions that weren't necessarily on point.

6 THE COURT: So I just wanted to start by just sort
7 of getting current on our research. Obviously, I have a
8 wonderful law clerk and we want to make sure that whatever we
9 write does have the latest research in it.

10 So I'll ask you, Mr. Branigan, that if this were not
11 a habeas case and it was here on direct litigation, so to
12 speak, and not on habeas review -- the habeas thing adds some
13 complexities to it, obviously.

14 MR. BRANIGAN: Right.

15 THE COURT: Do you think the case would be decided
16 differently?

17 MR. BRANIGAN: No, Your Honor.

18 THE COURT: Why not?

19 MR. BRANIGAN: Because there's never been a
20 five-judge majority of the Supreme Court that excluded this
21 type of evidence, meaning the Melendez-Diaz and Bullcoming.
22 In both of those cases, you both had sworn-to documents that
23 were admitted solely for the primary purpose of proving a
24 particular fact. In this case, the documents are not sworn
25 to; there's a four-judge plurality.

SHERRY BRYANT, RMR, CRR

A000422

A612

1 THE COURT: We're going to talk about Williams. But
2 it seems that the issue -- here the person is in custody at
3 the time that the DNA evidence was obtained, right?

4 MR. BRANIGAN: Correct.

5 THE COURT: And in Williams, that seemed to be a
6 significant consideration by the plurality, so to speak, in
7 Williams, the in custody or not in custody dynamic, right?

8 So you have a situation when somebody's in custody,
9 this would not be on habeas review but on just direct appeal.
10 You say it would not make any difference either way. You
11 can't say that the results would be different than what
12 Williams instructs.

13 MR. BRANIGAN: That is correct. That is this
14 four-judge plurality hasn't analyzed it. And I'd suggest,
15 Your Honor, that these same four judges would have come
16 down -- even if we change the circumstances up more, they
17 would have on come down as they did.

18 THE COURT: Which four judges are you talking about?

19 MR. BRANIGAN: The four judges in the plurality on
20 this case. And if you look right at the top of their
21 decisions, they talk about how this type of scientific
22 evidence has been admitted for the last 200 years. When they
23 talk about primary purpose, they also discuss how the
24 scientists actually work in a case like this, meaning you have
25 an assembly line, each person doing their own discrete task,

1 so nobody actually accusing the -- or offering testimony in
2 the sense of the Confrontation Clause.

3 THE COURT: So then I have your take on that.

4 Mr. Laisure, let me just focus on the fact that it
5 doesn't appear to me that the issue of custody is the sine qua
6 non of Alito's decision unless I'm reading it wrong, that he
7 talks, as Mr. Branigan has just suggested, about a range of
8 other factors that are in play here certainly apart from the
9 custody issue.

10 And your position is that that's not the sine qua
11 non.

12 MR. BRANIGAN: Correct, Your Honor.

13 THE COURT: So you have to address that.

14 MR. LAISURE: We're talking about Williams, right,
15 Judge?

16 THE COURT: Yes.

17 MR. LAISURE: My reading of Williams is there were
18 two reasons that the four-judge plurality decided that there
19 was no Confrontation Clause problem. One was the custody
20 issue, that there was no target. The other was that it was
21 not introduced into evidence.

22 My position is neither of those things are present
23 in our case. In our case, the evidence was introduced into
24 evidence before the jury without a limiting instruction and
25 the testing was done before a target. And when you add those

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A000424

A614

1 facts together and you go to the dissent, and the dissent said
2 that, you know, they thought that even -- that the majority
3 opinion denying it was incorrect and that it should have been
4 considered a Confrontation Clause, and you look at the dicta
5 of the majority, Alito said: Absent an evaluation of the risk
6 of juror confusion, which was not done in our case, and
7 careful jury instructions, which were not given in our case,
8 the testimony could not have been brought before the jury.

9 So the four dissenters would have agreed that there
10 was a Confrontation Clause violation and the four plurality
11 would also have agreed on our facts.

12 THE COURT: Well, that's the problem, whether that's
13 really correct. Certainly the four dissenters, we know that.
14 We're not talking about Thomas, we know how Justice Thomas
15 would decide the case, right? We're talking about Alito's
16 decision.

17 He seems to talk about other considerations, and I'm
18 quoting from the plurality opinion. "When lab technicians are
19 asked to work on the production of a DNA profile, they often
20 have no idea what the consequences of their work will be. The
21 technicians who prepare a DNA profile generally have no way of
22 knowing whether it will turn out to be incriminating or
23 exonerating or both." That's the plurality opinion at page
24 2244. It goes on to say: "And in many labs numerous
25 technicians work on each DNA profile, such that when the work

SHERRY BRYANT, RMR, CRR

A000425
A615

1 of a lab is divided up in such a way it is likely that the
2 sole purpose of each technician is simply to perform his or
3 her task in accordance with accepted procedures."

4 So it seems that these are factors that really are
5 not dependent upon whether something was offered in evidence
6 or not or whether somebody was in custody or not. So I lifted
7 that out of Williams, the plurality opinion.

8 MR. LAISURE: Well, I disagree with that.

9 THE COURT: You don't disagree with whether I'm
10 quoting it correctly?

11 MR. LAISURE: No, I don't disagree with the quote,
12 but I disagree with the conclusion, because Melendez-Diaz and
13 Bullcoming, which are both forensic evidence cases, talk about
14 the fact that you need to have the right to challenge the
15 competency of what is being done by the lab technicians, and
16 that once someone is targeted then the correct way of
17 challenging that is confrontation, is cross-examination.

18 THE COURT: So Justice Kagan says that one thing is
19 most cases which we thought have clearly set forth the law
20 don't seem to be so clear anymore; right? So she seems to
21 suggest that this is really not so clear. So that gets us
22 into the habeas dynamic as well, because we have to apply
23 clearly established Supreme Court law, and Kagan says it's not
24 clearly established. What do I do with that?

25 MR. LAISURE: I don't think that that's really what

SHERRY BRYANT, RMR, CRR

A000426

A616

1 she was saying. The problem is that when you look at the
2 Williams statement that it shouldn't have come in and you have
3 a five-judge majority saying that forensic evidence requires
4 cross-examination when you have a targeted individual, the
5 fact that it's DNA versus blood alcohol content versus cocaine
6 testing becomes a difference that it's irrelevant what kind of
7 forensic testing is involved.

8 So when you take the facts of Williams and turn them
9 on their head and say the DNA was a targeted individual, which
10 is our case, and was put directly into evidence, how is it
11 different from Bullcoming and Melendez? I don't think it is.

12 THE COURT: Well, I think Mr. Branigan is going to
13 tell you why it is right now, or he's going to try to do that.

14 MR. BRANIGAN: Well, it's -- first of all, Your
15 Honor, the real difference here is that there is no sworn-to
16 document, meaning that there is no -- there is a sworn-to
17 document, but that --

18 THE COURT: It was put into evidence. He was in
19 custody and this was relied upon as evidentiary material.

20 MR. BRANIGAN: It still wasn't a sworn-to
21 conclusion, and that's all that Justice Thomas has said that
22 he'll exclude. So that's why there's a different result in
23 this case.

24 Secondly, as far as the ultimate conclusion in this
25 case, comparing it to Bullcoming and to Melendez-Diaz, the

1 testifying analyst is relying on a series of machine-generated
2 graphs. She's looking at the graphs and coming to a
3 conclusion on the stand.

4 In Bullcoming, the sworn-to document by the
5 nontestifying analyst was a certification in which he put the
6 number on and he put some other information on, and that was
7 introduced into the evidence to prove the main fact at issue
8 in trial. So this is --

9 THE COURT: I interrupt all the time. I used to say
10 I don't mean to interrupt and I always believed I did mean to
11 interrupt, so I don't say that anymore.

12 But a jury doesn't know the difference about
13 something being sworn to; they know what's in evidence and
14 what's not in evidence. Really, isn't that the heart of the
15 Confrontation Clause dynamic?

16 MR. BRANIGAN: Ultimately, the -- well, there's
17 differing opinion on what the heart of the dynamic is. And
18 what the plurality would say in this particular case is that
19 an analyst is always entitled to rely on foundational
20 information.

21 And here, the foundational information is what's
22 contained in those documents. The jurors looking at that
23 couldn't possibly make any sense out of it. The graphs
24 contain -- the information contained only can provide a
25 foundation to the testifying analyst to make her ultimate

SHERRY BRYANT, RMR, CRR

A000428

A618

1 conclusion that the DNA, the DNA matched the defendant's DNA.

2 THE COURT: All right. So now for habeas purposes,
3 if I were deciding this case in the first instance I might
4 say, well, I interpret the Supreme Court decision to be as you
5 suggest I should; but now we have the added wrinkle of habeas,
6 which says that no reasonable jurist can disagree, that very,
7 very high standard.

8 I guess conceptually, there's such a case which is
9 one which we could decide differently on direct review as
10 compared to the dynamics of the habeas review. It's that
11 extra wrinkle that really lose a lot of habeas cases.

12 How do I get around the habeas standard here?

13 MR. LAISURE: I think Mr. Branigan hasn't shown how
14 this case is different from Bullcoming and Melendez, and
15 that's how. If this case is the same as those cases, then
16 there's clearly established law.

17 And my position is this case is so different from
18 Williams and the main reasons that Williams was decided that
19 this case instead comes under the very general and plausible
20 rubric of those other two cases, which is that forensic
21 evidence, targeted individual, you need confrontation.

22 THE COURT: I guess I'm stuck on the fact that
23 Justice Kagan, who's a lot smarter than I, doesn't think those
24 cases are so clear anymore in light of Williams, in light of
25 the plurality of Williams.

SHERRY BRYANT, RMR, CRR

A000429

A619

1 MR. LAISURE: Well, she could be wrong, Judge.

2 THE COURT: She's a reasonable jurist.

3 MR. LAISURE: I understand that, but --

4 THE COURT: The standard is whether a reasonable
5 jurist would agree.

6 MR. LAISURE: Well, we can only look at what the
7 courts have said, you know, and what's out there. And she may
8 have the impression that the next case from Williams is going
9 to go some different direction and that may be what she's
10 referring to.

11 But when you look at just the facts of Williams and
12 those two prior cases, I think the state of the law now is
13 very clear and that the fact that it's DNA doesn't change it
14 in any appreciable way.

15 Melendez-Diaz, by the way, said that neutral testing
16 to which Your Honor was referring before is -- that's been
17 rejected. The Ohio-Roberts guarantee of trustworthiness thing
18 is gone. And so it's really a question of being able to have
19 that constitutional right to challenge it the way you want to
20 challenge it, regardless of whether it seems trustworthy,
21 whether it probably is right. None of that really matters.
22 And I don't see a difference between the facts of this case as
23 distinguished from Williams and those other two cases.

24 THE COURT: What I'm thinking of doing here at the
25 very least is to certify this to the Circuit Court. I think

SHERRY BRYANT, RMR, CRR

A000430

A620

1 that's indicated here so you have appealability, I guess,
2 right? And that's going to be the court that's going to
3 ultimately decide this case. I'm just sort of like a passing
4 station, I suspect, right?

5 MR. LAISURE: If that's the case, Judge, could I add
6 something that's not in our papers but -- well, the argument
7 part is not in our papers. It's in our Exhibit F that I
8 attached to the reply, and it goes to the people's argument
9 concerning whether the material is simply graphs and charts.

10 Bullcoming had a number of factors that it talked
11 about, whether the sample received was sealed, whether there
12 were specific tests done, whether there was no contamination,
13 whether there were identifying numbers that were accurate.
14 All of those appear in the underlying -- not the part that was
15 signed by Mr. Yanoff, but in the underlying graphs and charts.
16 There were statements made in there that go to each and every
17 one of the Bullcoming statements that they said were
18 testimonial and not just machine-generated stuff. So I wanted
19 to call Your Honor's attention to that.

20 THE COURT: So we can go on and on and on, but I
21 think I got a handle on it and I just wanted to give you folks
22 an opportunity to chat with me a little bit about these. I
23 think I identified the principal concerns that we have to
24 address here, right?

25 Is there anything else you would like to add?

1 MR. BRANIGAN: Your Honor, I don't have anything to
2 add except just that this is -- there is a lot of confusion in
3 the state of the law. It's very fluid. And, again, for
4 habeas purposes, I'd just add that there's no clear Supreme
5 Court precedent.

6 THE COURT: I understand. But this is sort of like
7 your preparation for your argument before the Second Circuit
8 and maybe the Supreme Court. Who knows, right? But I
9 appreciate the efforts you've made and we'll try to do the
10 best we can to at least explain what we're about here.

11 My instincts are that the law doesn't need that high
12 habeas standard. That's my instinct. And that I find it to
13 be kind of curious, because it may well be that if we didn't
14 have to grapple with the habeas standard, who knows what I
15 would have said, right? But I think I'm tending in that
16 direction under the constraints of the habeas statute.
17 Sometimes I don't like it, but I guess I took an oath to
18 follow the Supreme Court.

19 So probably I'm going to come out that way, but I'm
20 certainly going to address all of your concerns, hopefully, in
21 a fulsome way and try to get the latest word from our Circuit
22 authority so that when you go up to the Second Circuit you'll
23 have at least an updated version of where we're at today from
24 the desk of one judge. Okay?

25 So thanks very much. I enjoyed very much your

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1 appearance and the work that you've done and I appreciate that
2 you sat so quietly and listened to all of this. Would you
3 like to add anything? Feel free to speak your piece.

4 MR. LAISURE: I'd like to add one thing, my thanks
5 that you adjourned this due to the e-mail confusion that
6 originally I didn't know about the argument and you put this
7 off and that was great. Thank you.

8 THE COURT: I'm sorry, thanking me for what, just
9 having the oral argument?

10 MR. LAISURE: For putting it off. It was originally
11 scheduled for a different date.

12 THE COURT: No, no, no, listen. It's easy enough to
13 try to help lawyers.

14 MR. LAISURE: Appreciate it.

15 THE COURT: Thanks a lot.

16 MR. BRANIGAN: Thank you, Your Honor.

17 (Whereupon, the proceedings were adjourned.)
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1 I certify that the foregoing is a correct
2 transcript from the record of proceedings in the
3 above-entitled matter.

4
5 /s/ Sherry Bryant
6 Sherry Bryant, RMR, CRR
7 Official Court Reporter
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